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ABSTRACT

This volume presents a transcript of discussion and statements presented at an oversight hearing before the House Subcommittee on Employment Opportunities. The hearing reviewed new enforcement policies of the Equal Employment Opportunity Commission (EEOC), which had the stated intent of increasing the litigation of individual cases of unlawful discrimination. Among the speakers were the commissioner of the EEOC, who described the policy revisions; the executive director of the Lawyers' Committee for Civil Rights Under Law, who discussed problems seen in the revisions and focused on the Stotts case; and two psychologists, who commented on the validity of policies affecting the uniform guidelines for selection procedures. (KH)

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OVERSIGHT HEARING ON THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S ENFORCEMENT POLICIES

ED268196

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, JULY 18, 1985

Serial No. 99-27

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OVERSIGHT HEARING ON THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S ENFORCEMENT POLICIES

THURSDAY, JULY 18, 1985

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 2261, Rayburn House Office Building, Hon. Matthew G. Martinez (chairman of the subcommittee) presiding.

Members present: Representatives Martinez, Williams, Gunderson, Henry, and Jeffords.

Staff present: Eric P. Jensen, acting staff director; Paul Cano, legislative assistant; Genevieve Galbreath, chief clerk/staff assistant; Dr. Beth Buehlmann, Republican staff director for education; and Mary Gardner, Republican legislative associate.

Mr. MARTINEZ. This hearing will come to order.

Today's hearing will be an oversight review of EEOC's new enforcement policies. Next Tuesday, July 23, at 9 a.m., the subcommittee has invited the administration officials from the Justice Department, the EEOC, the Department of Education and the National Endowment of the Humanities to comment on the Federal collection of affirmative action plans and the enforcement of Federal EEOC complaints.

In September last year and February of this year, the Equal Employment Opportunity Commission announced new policy changes in its enforcement and remedial policies. The stated intent of the Agency was to increase the litigation of individual cases of unlawful discrimination. The witnesses today will comment in detail on these changes.

As chairman of the oversight subcommittee for the EEOC, however, I have received numerous messages of concern about the EEOC's perceived change in enforcement policies and commitment.

These perceptions have, unfortunately, been fueled by comments in the press by the chairman and other Commissioners, which have parrotted the Justice Department's interpretation of the civil rights law in light of the Department's reading of the *Stotts* case.

Let me caution responsible EEOC officials that this Chair and the House of Representatives does not accept the Justice Department's careless reading of the *Stotts* decision, and wholly disapprove of the manner administration officials are using their inter-

pretation of the civil rights law to undo 30 years of hard struggle for equal opportunity in this country.

Quite simply, the Supreme Court has not fully and directly addressed the issue of prospective race and gender-concious relief for unlawful discrimination. Let that be perfectly clear.

With respect to the perception problem at the EEOC, the agency has notified the Office of Management and Budget that it intends to modify current rules and policies on the uniform guidelines on employee selection procedures, a key device for monitoring discrimination in employee selection procedures; Management Directive 707 which governs the collection of Federal affirmative action plans; the equal pay for equal work portion of the Fair Labor Standards Act; the handicapped regulations; Federal EEO regulations; and regulations on costs and benefits under employee benefit plans.

This wholesale action by the Agency has raised considerable concern in the civil rights and labor community. This subcommittee and the public will be watching the EEOC activities closely to ensure that equal employment opportunity laws are not tampered with or reversed.

Mr. Henry, do you have a statement?

Mr. HENRY. Mr. Gunderson first.

Mr. MARTINEZ. Oh, Mr. Gunderson, I didn't notice you came in. We have with us on the committee, Steve Gunderson, ranking minority member, and Mr. Henry.

Mr. GUNDERSON. Thank you, Mr. Chairman. I want to begin my remarks by welcoming Commissioner Alvarez to our subcommittee. I think it is a good time for us to really have some oversight in this whole issue of equal employment opportunities, the Commission's enforcement, remedy and relief policies.

I would hope that as I begin, that I would caution, I guess, my colleagues on both sides of the aisle that if this is to be an oversight hearing, then we ought to begin with open minds.

If we are here with preconceived notions and closed minds and conclusions, I think frankly, we are wasting the time of this subcommittee and certainly the time of the Commissioner, if we are not interested in really finding out the facts are before we make up our minds, jump to conclusions.

I happen to be pleased that we have with us such a dedicated Commissioner here with us this morning to explain the policies and hopefully clear up any misconceptions that might exist in the minds of this subcommittee and perhaps also in the public as a result of—if I may be so blunt, some inaccurate press reports.

I also hope that the Commissioner will be able to explain to us in lengthy terms exactly what were the Commission's motives in adopting the two new policy statements, and explain exactly what they mean to the Commission's enforcement capabilities.

The adoption of these two new statements, the Commission's statement of enforcement issued September 11, and its policy statement on remedies and reliefs for individual cases of unlawful discrimination, issued February 5, the Commission, I think, has committed itself to pursuing full and effective relief on behalf of every victim of unlawful discrimination, both through individual and class actions, and that seems to me to be appropriate.

Admittedly, this commitment reflects a shift in policy for the EEOC, and I truly believe that it is seen by the Commission as an effort to more vigorously enforce the equal opportunity laws in this country.

There has been a lot of criticism and skepticism of this Commission every since President Reagan took office and his appointees have begun to fill the various positions in the Commission.

I almost think that this Commission's aggressive new policies are met with opposition, not so much because of their substance, but rather, because they are coming from this administration, and some people frankly find it hard to believe that this administration can be aggressive in any type of enforcement of equal employment opportunity.

And the statement of enforcement policy provides that every case which the District Director finds in violation of the statues the Commission enforces be submitted to the Commissioners for litigation consideration if conciliation fails.

Now, this policy has been criticized because, No. 1, caseloads are too big, and No. 2, it is interpreted as focusing on individual cases.

As I understand it, in all actuality, more pattern and practice cases are found through individual or small group complains than through the systemic approach initiated by the Commissioners.

In terms of remedies and relief policy, this is also criticized because this policy, insisting on full relief for those discriminated against, is perceived as being too inflexible.

Well, while this is a tougher course than was initiated before, it makes sense, that if the Commission's policy is seen as one of certainty and predictability in acting on cases, many more respondents will be willing to participate in a conciliation as they know litigation happens to be a real threat.

These are new policies, certainly. They ought to be given a chance, and they certainly ought to be given a chance to be defended and explained to this subcommittee before they are criticized.

Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Gunderson.

Mr. Henry.

Mr. HENRY. Thank you, Mr. Chairman.

I, too, would simply life to welcome Mr. Alvarez. I have to say that, quite frankly, there have been many concerns for 5 years now, as to the commitment of the current administration relative to its dedication to the active and aggressive enforcement, the whole panorama of civil rights legislation.

And it is in light of many of these concerns that, obviously, any change in policy is subject to a great deal of skepticism.

I do understand that you have every reason to believe that some of the actions of the Commission have been misinterpreted by the press, that you have responded in some respects with letters, which have not received the courtesy of publication.

So certainly, I want to hear the Commissioners' side of the story, Mr. Chairman, but also to suggest that I share the concern about what I believe, quite frankly, has been a tendency to diminish the importance of aggressive civil rights enforcement.

And I think you bear that burden, and it creates a skepticism which makes it hard to deal, I think, sometimes constructively. I

hope we can put away that kind of prejudice, hear what you have to say on the merits, and make informed, constructive comments and engagement with you that will really strengthen civil rights enforcement in the eyes of all.

Thank you.

Mr. MARTINEZ. We are joined today by Congressman Pat Williams from the great State of Montana. We are making opening statement. Mr. Williams, before I ask for your opening remarks, I would like to simply put Mr. Gunderson's mind at ease. My mind is not prejudiced; it is not made up.

We had a very, I think, interesting conversation, Mr. Alvarez and I, before the hearing. I understand you did, too. There were some issues that were raised with him that will be raised today. Hopefully, his statements today will cover the ground that we covered.

Mr. Williams.

Mr. WILLIAMS. Mr. Chairman, no statement.

Mr. MARTINEZ. With that, we will introduce our first witness, Commissioner Fred W. Alvarez, Equal Employment Opportunity Commission, and let me state while he is sitting down that his written statement will be entered into the record in its entirety, so if you wish, you can summarize and highlight your testimony.

Also, we will be on the 5-minute rule for the questioning of the witnesses.

Mr. Alvarez.

STATEMENT OF FRED W. ALVAREZ, COMMISSIONER, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. ALVAREZ. Thank you, Mr. Chairman, thank you, members of the subcommittee.

If I would, I would like to deliver a summary of my statement. However, it will be because of the entire context of the package in the enforcement program, it is necessary from our standpoint to explain in more detail what our program is, and therefore, with the Chair's permission, I would like to deliver most of my statement to you so that I can explain it in its full context.

Mr. MARTINEZ. That is well and good.

Mr. ALVAREZ. Thank you.

I welcome the opportunity on behalf of the Commission to address you on the issue of the new remedies policy and to discuss with you what the impact of the remedies policy will be.

I need to make clear to you, however, that I will be discussing unanimously adopted Commission policies, but only as a single member of a five-member Commission. Your invitation also asked us to be prepared to discuss any proposed revisions to the Uniform Guidelines on Employee Selection.

Because I have less to report to you on that, let me talk about that first.

Last July, the Commission approved a resolution to expand its review of the guidelines from a review of the recordkeeping aspects of it, to review the guidelines in their entirety.

In preparation for my testimony today, I was advised by our Office of Legal Counsel that a general review for Commission study

and background is still under preparation. No proposals for any revisions to the guidelines have been presented to the Commission from the staff, nor am I aware that any have been developed by any Commissioner or any office within the Commission yet.

Therefore, the status of the general review is at a staff level, so far as I can tell.

With respect to the enforcement program, it is important that I discuss the remedies policy with you in the context of the entire enforcement program. The remedies policy is the third part of a package of policies designed to implement this Commission's approach to more effective law enforcement.

The hope of the Commission is that through policies like this one, we can move the agency to a higher level of enforcement. Let me put this in context: The Commission believes, as does Congress, that the Equal Employment Opportunity Commission is a law enforcement agency.

The Commission believes that an effective law enforcement agency must do at least three things well. First of all, it must make decisions which are as accurate as possible on charges filed before it, alleging a violation of the laws it enforces.

Secondly, it must be predictable about bringing enforcement actions when the laws are violated, and third, it must seek the fullest relief available on behalf of those harmed by the violation as it can.

The package of enforcement policies I will describe for you addressed directly those components. First of all, the investigative policy. In December 1983, this Commission determined that it was ready to move toward a more complete and better quality investigations of charges by shifting more of its resources from the rapid charge processing system to a system which encouraged fuller investigations.

The rapid charge system was designed to offer the parties to the charge of discrimination an early opportunity to resolve the charge through a negotiated settlement with minimal investigations, and without a finding by the Commission on the merits of the allegation.

The Commission staff, in presenting the December 1983 resolution, acknowledged that the role of the rapid charge system had become primarily that of a facilitator or a claims adjuster. However, because the rapid charge system performed several distinct functions, the Commission's resolution did not abolish the system.

Rather, it eliminated the presumption in favor of the rapid charge system and directed that a case-by-case analysis be done to determine whether an incoming charge should be assigned to an extended investigation unit.

The principal concern was that the predominant reliance on the rapid charge system eliminated a large number of cases which, if fully investigated, would have more directly fulfilled the primary law enforcement mission of the agency.

The clear expectation of the Commission's staff was that a larger number of cases would be more fully investigated, and in those investigations which merit was found, the hope was that the full investigation would result in a more accurate decision and a better

quality case for the Commission's litigation program, should conciliation fail.

I was not a member of the Commission in 1983, but I would have supported that resolution, because in my view, it made a significant contribution toward the quality of our decisionmaking on charges.

I was a member, however, of the Commission in September 1984, when we adopted the second policy in this package, the statement of enforcement policy. That policy is relevant to both the accuracy and quality of determinations we make, and the predictability of our enforcement program.

The policy is a simple one. It states that once a field investigation determines that reasonable cause exists to believe that one of the laws the Commission enforces has been violated, conciliation efforts as the law prescribes will be fully pursued.

If, however, conciliation proves unsuccessful, all such cases should be submitted directly to the Commission for litigation authorization. Under the previous practice, a meritorious case was submitted to several layers of legal review, which asked the question, is this meritorious case worthy of our resources?

Sometimes the question was, should we litigate this meritorious case? Thus, even though a finding had already been made by our own agency that reasonable cause exists to believe that the law was violated, we continued to ask ourselves through several layers of lawyers whether we should pursue that violation.

In adopting the statement of enforcement policy, this Commission saw no reason to continue the process of picking and choosing from among meritorious cases unless some overriding reason existed not to pursue the case.

In effect, under the previous practice, a good reason had to exist to pursue a case in which we found discrimination, and under the new policy, a good reason has to exist not to pursue a case.

Encouragement of quality decisionmaking in the field is a principal goal of the enforcement policy. We hope that by bringing all unconciliated, reasonable cause determinations directly to the Commission, bypassing unnecessary layers of repeated legal review, our field investigators, our field attorneys, and our field decisionmakers, will have a stronger incentive to produce in the first instance a higher-quality product.

Under this policy, a much higher probability exists that the Commission will authorize field officials to act on the results of that reasonable cause determination.

In addition, field investigators, field attorneys, and district directors can now be assured that the Commission will directly review their investigative memoranda, legal analyses, and decisions.

Under previous practice, most meritorious cases never reach the Commission because a series of legal reviews, each with the effective authority to reject those determinations never reach the Commission.

Similarly and just as important, is the message we are sending to employers and unions. That message is that if our investigative policy produces a reasonable cause determination, they can expect that the EEOC will pursue enforcement action, unless a successful conciliation is achieved.

Simply stated, we have attempted to introduce a degree of certainty of enforcement that did not exist under our previous practice. In the past, the frequency with which enforcement actions were brought to back up our own reasonable cause determinations, caused many who dealt with EEOC to disregard our process, and to take us less than seriously.

We hope that the new policy will help us integrate the results of our investigative process into an effective enforcement program. We expect that predictable enforcement should promote more compliance and more conciliation.

Finally, the remedies policy arose out of a collective sense on the Commission that remedies should be sought to the full extent of the equitable power contained in title VII and its legislative history.

In addition, there was a feeling that a comprehensive statement on relief for individual cases of discrimination was necessary so that our field personnel would think in terms of more complete relief in cases in which cause was found, or about to be found.

In that connection, we have developed a five-point policy statement. That policy statement contains the following elements: A requirement that all employees in the affected facility be notified of their right to be free of discrimination, and assured that the particular type of discrimination won't occur again.

Two, a requirement that corrective, curative or preventive actions be taken or measures adopted to insure that similar violations of the law will not recur.

Three, a requirement that each identified victim of discrimination be unconditionally offered placement in the position that the person would have occupied but for the discrimination suffered by that person.

Four, a requirement that each identified victim be made whole for any loss of earning.

And five, a requirement that the respondent cease engaging in the specific unlawful employment practice found.

This collection of remedies was drawn from our own experience under title VII and the Age Act, and from practices used by the National Labor Relations Board to remedy discrimination against employees who exercised their rights under that Federal law.

The legislative history of title VII is very clear that the remedial section of the National Labor Relations Act was the model for the remedial section of title VII. Moreover, we assume that Congress intended victims of discrimination on the basis of race, color, religion, sex, national origin, age and handicap in the Federal sector to receive as complete relief as victims of discrimination on the basis of engaging in or refraining from union activity.

Certainly, the eradication of employment discrimination is as important a national goal as is the promotion of collective bargaining.

When the policy was formally announced, there was some confusion in the press concerning what the effect of this policy might be on the Commission's pursuit of class action cases.

The Commission will pursue class actions. The Commission has confirmed its intentions in an April 23, 1985 letter to 43 Members of Congress. A copy of that letter is in my statement as well.

The Commission has plainly stated that accurate decisionmaking and full make-whole and preventive relief are the principal components of this Commission's approach to enforcing the laws committed to it by Congress.

Preliminary results clearly indicate that there is a substantial increase in the number of cases approved by the Commission. This increase in our litigation efforts, coupled with our policy on remedies and relief, will improve the Commission's ability to act quickly and strongly to vindicate the rights of any person suffering unlawful employment discrimination.

We will closely monitor our efforts to ensure that they provide the effective enforcement results which the Commission intended. We are encouraged by the reception these policies are receiving from our field employees, and the renewed sense of enthusiasm among those employees, as they view themselves more and more as part of a maturing law enforcement agency.

I will be happy to answer any questions on those foregoing policies.

[The prepared statement of Fred W. Alvarez with attachments follows:]

PREPARED STATEMENT OF FRED W. ALVAREZ, COMMISSIONER, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Good morning. My name is Fred Alvarez. I am a member of the Equal Employment Opportunity Commission. As a preliminary matter, I wish to express my thanks to the subcommittee for inviting me to appear at its hearing on the Commission's policy statement on remedies and relief for individual cases of unlawful discrimination. I welcome this oportunity to describe to the subcommittee the new remedies policy and to discuss with you what impact the Commission expects the policy to have on our overall enforcement program.

I must make clear that while I will discuss unanimously adopted Commission policies, I am appearing before you and speaking as a single member of a five-person Commission.

I. UNIFORM GUIDELINES OF EMPLOYEE SELECTION PROCEDURES

The invitation from the subcommittee also requested that I be prepared to discuss the status of any proposed revisions to the uniform guidelines on employee selection procedures. Because I have less to report to you on that issue, let me talk about that first. Last July the Commission approved a resolution to expand its review of the guidelines from a review of the record keeping requirements of the guidelines to review of the guidelines in their entirety.

In preparation for my testimony today I was advised by our Office of Legal Counsel that a general review for Commission study and background is still under preparation. No proposals for any revisions to the guidelines have been presented to the Commission from our staff nor am I aware that any have been developed by any Commissioner of office within the Commission yet. Therefore, the status of the general review continues to be at a staff review level so far as I can tell.

II. ENFORCEMENT PROGRAM

In order to discuss the impact of the new remedies policy on the Commission's overall enforcement program it is important that I spend a brief amount of your time describing how the new remedies policy fits in to our overall enforcement program. The remedies policy is the third part of a package of policies designed to implement this Commission's approach to more effective law enforcement in the field. The hope of the Commission is that through policies like the ones I will describe for you, we can move the Agency to a higher level in its development as a law enforcement agency.

Let me put this in context: The Commission believes, as does Congress, that the Equal Employment Opportunity Commission is a law enforcement agency. The Commission believes that an effective law enforcement agency must do at least three

things well: First of all, it must make decisions which are as accurate as possible on charges filed before it alleging a violation of one of the laws which the agency enforces; second, it must be predictable about bringing enforcement actions when violations of these laws are found; and third, it must seek the fullest relief available on behalf of those who were harmed by the violation of the law involved. The package of enforcement policies I will describe is designed to address directly these components of an effective law enforcement agency. We therefore have developed an investigative policy, an enforcement policy and a remedial policy. Let me focus on each one:

A. The Investigative Policy

First, I will describe the investigative policy. In December 1983 the Commission determined that it was ready to move toward more complete and more accurate investigations of charges by shifting more of its resources from the rapid charge processing system to a system which allowed fuller investigations. The Rapid Charge Processing System was designed to offer the parties to a charge of discrimination an early opportunity to resolve the charge through a negotiated settlement with minimal investigation and without a finding by the commission on the merits of the discrimination alleged. The Commission staff in presenting the December 1983 resolution acknowledged that the role of the rapid charge processing system had become primarily that of a facilitator or a "claims adjustor." However, because the Rapid Charge Processing System performs several distinct functions, the Commission's resolution did not abolish the system. Rather, it eliminated the presumption in favor of handling charges through the rapid charge processing system and directed that a case-by-case analysis be done to determine whether an incoming charge should be assigned to an extended investigation unit. The principal concern was that the predominant reliance on the rapid charge processing system eliminating a large number of cases, which if fully investigated, would have more directly fulfilled the primary law enforcement mission of the Agency. The clear expectation of the Commission staff and the Commission in adopting the December 1983 resolution was that a larger number of charges would be fully investigated. In those investigations in which merit was found to exist, the hope was that a fuller investigation would result in a more accurate decision and a better quality case for the commission's litigation program should conciliation fail.

I was not a member of the Commission in December 1983 but would have supported the Commission's resolution because in my view it made a significant contribution to the quality and accuracy of decisionmaking on charges.

I have attached, as exhibit A, a copy of the December 1983 resolution to this statement.

B. The Enforcement Policy

I was, however, a member of the Commission in September 1984 when we adopted the second policy in this package, the statement of enforcement policy. The policy is relevant to both the accuracy of determinations and predictability of enforcement. The policy is a simple one. The policy states that once a field investigation determines that reasonable cause exists to believe that one of the laws the Commission enforces has been violated, conciliation efforts should be fully pursued. If, however, conciliation proves unsuccessful, all such cases should be submitted directly to the Commission for litigation authorization. Under the previous practice, a meritorious case was subjected to several layers of legal review which asked the question "is this meritorious case worthy of our resources?" Sometimes the question was "should we litigate this meritorious case?" Thus, even though a finding had already been made by our own agency that reasonable cause exists to believe that the law was violated, we continued to ask ourselves through several layers of lawyers whether we should pursue that particular violation. In adopting the statement of enforcement policy this Commission saw no reason to continue the process of picking and choosing from among meritorious cases unless some overiding reason existed not to pursue those cases. In effect, under the previous practice, a good reason had to exist to pursue a case in which we found reasonable cause. Under the new enforcement policy, a good reason has to exist not to pursue a case in which discrimination has been found.

Encouragement of quality decisionmaking in the field is a principle aspect of the enforcement policy. We hope that by bringing all unconciliated reasonable cause determinations directly to the Commission, bypassing unnecessary layers of repeated legal review which rework and filter meritorious cases, our field investigators, field attorneys and field decisionmakers will have a stronger incentive to produce, in the first instance, a higher quality work product. Under this policy, a much higher probability exists that the Commission will authorize field officials to act on the results

of that reasonable cause determination than existed in the past when the layers of legal review produced an erratic pattern and small number of enforcement actions. In addition, field investigators, field attorneys and district directors now can be assured that the Commission will directly review their investigative memoranda, legal analysis and determination letters. Under previous practice most meritorious cases never reached the Commission because a series of legal reviews, each with effective authority to reject the product produced by that investigator, those lawyers and that field district director prevented those cases from receiving Commission consideration.

Similarly, and just as important, is the message we are sending to employers and unions who are subject to charges of discrimination. That message is that, if our investigative process produces a reasonable cause determination, a high probability exists that the EEOC will pursue enforcement actions against that employer or union unless conciliation occurs. We have attempted to introduce a degree of certainty of enforcement that did not exist under previous practice. In the past, the infrequency with which enforcement actions were brought to back up our own reasonable cause determinations caused many who dealt with EEOC to disregard our process and to take us less than seriously.

We hope that this new policy will help us integrate the results of our investigative process into an effective enforcement program. The effect of predictable enforcement should promote more compliance with the law and more conciliation because of the credible and predictable threat of an enforcement action should a reasonable cause determination be made. A copy of the statement of enforcement policy is attached as exhibit B.

C. The Remedies Policy

Finally, the remedies policy arose out of a collective sense of the Commission that remedies should be sought to the full extent of the equitable power contained in title vii and its legislative history. In addition, there was a feeling that a comprehensive statement on relief for individual cases of discrimination was necessary so that our field personnel would think in terms of more complete relief in cases in which cause was found or about to be found. In that connection, we developed a five point policy statement. That policy statement contains the following points:

(1) A requirement that all employees in the affected facility where discrimination was found be notified of their right to be free from unlawful discrimination and be assured that the particular types of discrimination found will not happen again;

(2) A requirement that corrective, curative, or preventive action be taken or measures adopted to insure that similar violations of the law will not recur;

(3) A requirement that each identified victim of discrimination be unconditionally offered placement in the position that the person would have occupied but for the discrimination suffered by that person;

(4) A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination;

(5) A requirement that the respondent cease engaging in the specific unlawful employment practice found in the case.

This collection of remedies was drawn from our own experience under title VII and the Age Discrimination in Employment Act and from practices used by the National Labor Relations Board to remedy discrimination against employees who exercise their rights under that Federal law. The legislative history of title VII is very clear that the remedial section of the National Labor Relations Act was the model for the remedial section of title VII. Moreover, we assume that Congress intended victims of discrimination on the basis of race, color, religion, sex, national origin, age and handicap in the Federal sector, to receive as complete relief for the discrimination suffered as victims of discrimination on the basis of engaging in, or refraining from, union activity. Certainly, the eradication of employment discrimination is as important a national goal as is the promotion of collective bargaining. A copy of the statement on remedies and relief is attached as exhibit C.

When this policy was formally announced, there was some confusion in the press concerning what effect this policy might have on the Commission's pursuit of "class action cases." The Commission will pursue class actions. The Commission confirmed its intentions in an April 23, 1985 letter to 43 Members of Congress, a copy of which is attached as exhibit D.

D. Conclusion

The Commission has plainly stated that accurate decisionmaking and full make-whole and preventive relief are the principal components of this Commission's approach to enforcing the laws committed to it by Congress. Preliminary results clearly indicate that there is a substantial increase in number of cases approved by the

Commission. This increase in our litigation efforts coupled with our policy on remedies and relief will improve the Commission's ability to act quickly and strongly to vindicate the rights of any person suffering unlawful employment discrimination. We will closely monitor our efforts to ensure that they provide the effective enforcement results which the Commission intended in the adoption of these policies.

We are encouraged by the reception these policies are receiving from our field employees and the renewed sense of enthusiasm among those employees as they view themselves more and more as part of a maturing law enforcement agency.

I will be happy to answer any questions of the foregoing policies.

Exhibit A

Resolution

Whereas, the Equal Employment Opportunity Commission is determined to fulfill its mission to vigorously enforce the equal employment opportunity statutes for which it has been given responsibility through an increased priority on the investigation of complaints of discrimination; and

Whereas, the Commission has determined that through some adjustment to the administrative compliance functions and through a case-by-case analysis and assignment of discrimination charges and complaints, as outlined in exhibit A, the Commission can achieve a more balanced approach to its administrative and litigation enforcement responsibilities;

Now be it therefore resolved:

(1) that the Office of Program Operations is directed to communicate interim guidance to the field for the immediate implementation of this Resolution; and

(2) that the Office of Program Operations and the Legal Counsel are directed to submit to the Commission the necessary Compliance Manual and regulatory changes in conformance with exhibit A; and

(3) that the Office of Management is directed that appropriate budgetary allocations, training in investigative skills, and support services are to be allocated to meet these priorities.

Date.

Clarence Thomas,
Chairman.
Cathie Shattuck,
Vice Chairman.
Tony Gallegos,
Commissioner.
William A. Webb,
Commissioner.

Exhibit A—Guidance on Modification of the Administrative Charge Process

Intake

1. The Intake EOS will continue to elicit as much information as possible from the charging party during the Intake interview concerning the merits of the allegations of personal harm. In addition, the EOS will elicit information from the charging party with respect to other potentially aggrieved persons in the protected class and/or the operation of discriminatory practices or policies by the respondent. Any class allegations or information as to similarly aggrieved individuals presented by the charging party which relate directly to the allegations of the charging party should normally be included on the face of the charge. Class discrimination information which does not directly relate to the allegation of the charging party should be documented separately and retained with the file.

Work-sharing agreements which require a 706 agency to automatically waive any charge which alleges class allegations may be modified based upon the workload needs and program objectives of both the 706 agency and the field office, if the addition of class allegations described above adversely affects the present work-sharing agreement.

2. Mail-in charges which constitute minimally sufficient charges will continue to be docketed in Intake. It is within the discretion of the field office whether to redraft a minimally sufficient charge. The procedure for processing EPA and ADEA complaints and charges in Intake is presently being revised and should be in conformance with this guidance, except as the special provisions of those statutes may require.

3. It will be in the discretion of the District Office, based upon its litigation plan and enforcement program whether class allegations are investigated, and this will be explained to the charging party during the Intake interview. The present practice of allowing the charging party at the Intake stage to decide whether his or her charge is processed through rapid charge or extended investigation is eliminated. However, the EOS should note the charging party's desires, if expressed, in the file which is submitted to the Intake supervisor for review.

4. The field offices will have latitude to dismiss charges which meet the present requirements for dismissal under Commission regulations in the Intake process. Charges which are to be dismissed for lack of merit at the Intake stage should be dismissed only after a review by the TMC, including the Regional Attorney, and the grounds for the dismissal should be clearly documented. (Any such dismissals should be retained in a separate file so that they can be easily retrieved during quality reviews).

SCREENING

1. The two will issue instructions and guidance for a determination as to whether a Title VII of ADEA or concurrent Title VII/ADEA or EPA charge should be assigned ADEA and EPA complaints. EPA charges and complaints which will be processed by the extended unit or the rapid charge unit and to what extent an EPA complaint should be investigated. The Committee will also issue standards as to which processing unit should be assigned ADEA and EPA complaints. EPA charges and complaints which will be investigated will routinely be assigned to the extended unit since a proper investigation will in almost every case involve the need for an on-site investigation. The TMC must also be consulted routinely on retaliation charges for consideration for preliminary relief. Additionally, the TMC will be consulted regarding any charge or complaint the assignment of which is uncertain under existing guidance.

2A. Examples of standards which should be considered in assigning charges and complaints, whether individual or class in nature, for extended investigation are:

1. whether the allegations correspond to issues identified as priorities in local litigation plans, considering the status of the Legal Unit litigation portfolio;

2. whether several apparently meritorious charges with the same basis and issue have been filed against this respondent, and a full investigation is warranted (such consolidation should be coordinated with state and local FEP agencies);

3. whether the allogations are non-CDP, and a decision as to appropriate handling can only be made after a full investigation;

4. whether the respondent has evidenced a past recalcitrance;

5. whether the issues are necessarily class or there are a significant number of other potentially aggrieved persons;

6. whether the allegations involve the operation of a collective bargaining agreement, requiring participation of the union in the administrative process;

B. Examples of charges which may be referred to the Rapid Unit; in addition to those not covered in "A" above, are:

1. charges against state and local governments;

2. "Limited class" cases, typically involving only a few potentially aggrieved persons, and not involving issues identified for litigation;

3. charges on which the law is settled or which will require minimal assistance of an attorney during investigation in order to yield prompt litigation (e.g. mandatory retirement age statutes in some situations, retaliation)

3. Every Title VII, EPA and ADEA charge, and all EPA and ADEA complaints, will be screened by the Intake supervisor and may be screened by the Compliance Manager. In accordance with direction from the TMC an initial decision will be made as to whether the charge will be processed by the Rapid or Extended Unit. The TMC may elect to establish screening responsibility in an initial screening committee, to consist of at least one representative from the Legal Unit.

4. Charges received in the Area Office should be screened by the Area Director and supervisors in accordance with the guidance provided by the TMC pursuant to (1) above. In those Area Offices which do have Extended Units, a charge appropriate for extended Processing should be transferred to the District Office.

RAPID CHARGE PROCESS

1. An investigative plan and Request for Information should be prepared for the processing of almost all Title VII, EPA and concurrent charges referred to the Rapid Unit. The present standards for determining the appropriate method for processing ADEA charges should normally be the same as those under Title VII. Howev-

er, attempts at Section 7(d) conciliations without benefit of responses to Requests for Information from the respondent may be made when the charging party has evidenced a desire to proceed immediately to court or when the parties have expressed a clear desire to settle the charge. Exceptions to the necessity for preparing an RFI may be made, with the review of the Compliance Manager, only if the overall mission of law enforcement and informal resolution of discrimination complaints would be served thereby. Only charges which allege individual harm solely may be settled without the preparation of an RFI. The investigative plan need not be overly formalistic. The RFI should be prepared primarily from a revised Document Assembly System.

The decision as to the appropriate processing of a charge assigned to the Rapid Unit will be made on a case-by-case basis. Therefore, the notice of the charge which is sent to the respondent should normally not include an invitation to settle a Title VII charge. A decision to pursue a Fact Finding conference and attempted resolution of a charge will typically be made only after the response to the RFI is received and analyzed.

2. Once a response to the RFI is received, and any necessary additional information from the charging party is obtained the EOS will analyze the information and make a recommendation concerning the further processing of the charge and, in consultation with the supervisory EOS, and the Compliance Manager where appropriate, may pursue one of several options for the processing of the charge, including the following:

(a) issuance of a no cause decision (this option should be pursued only after the charging party has had an opportunity to respond to the information provided by the respondent);

(b) issuance of a cause decision (this option will probably be infrequently used given the burden of proof required in most cases);

(c) assignment for full investigation, including a possible on-site review;

(d) pursuit of a negotiated settlement attempt, with or without a Fact-Finding conference (settlement attempts should include the exchange of all relevant information between the parties);

(e) referral to the Extended Unit through the TMC.

3. Limited class cases assigned to the Rapid Unit should normally be investigated, and settlement efforts should be made, for all aggrieved individuals.

EXTENDED INVESTIGATIONS

1. Each charge which is assigned to the Extended Unit as a possible litigation vehicle will be assigned to a "team," including an attorney. An attorney need not be involved in those cases assigned to the Unit which are not considered as litigation vehicles, though an attorney's advice on such cases may be sought. Cases with litigation potential should be given priority.

The District Director and Regional Attorney will be jointly responsible for assuring that the attorney's involvement is timely and sufficient to assure a quality and "litigation worthy" investigation and that the attorney's participation is an integral part of the investigative process. To the extent possible, the same attorney should definitely be involved in the critical decision points in the development of a case which has been selected as a possible litigation vehicle, and his or her concurrence with the recommended action should be noted in the file.

2. Requests for information in charges assigned to the Extended Unit will be tailored to the specific allegations in the charge. The development of a sound investigative plan, which is flexible and which is reviewed periodically, is essential.

3. Whenever possible, an extended investigation will include an on-site review, if such review has been determined to be necessary to collect from or verify information submitted by respondent and to interview witnesses for both parties. (EPA investigations will almost always include an on-site review). The District Office should schedule work to be performed during an on-site review in such a way as to assure the maximum utilization of travel funds.

4. Negotiated settlements prior to the completion of an investigation will normally occur only as an option in the Rapid Unit, unless special circumstances exist to justify such a settlement of a charge assigned to the extended Unit. Pre-determination Settlement attempts after an investigation has been completed and the evidence is sufficient to make either a cause or no cause determination are inappropriate in non-systemic cases.

5. In a case in which the Commission has performed a substantial investigation when the charging party seeks to withdraw his or her charge as a result of a settlement with the respondent, or when the charging party requests a Right-to-Sue

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letter, the District Office may close the charge and determine to initiate a limited scope or directed investigation on the unresolved aspects of the charge. The TMC may also elect to continue its processing of a charge following the issuance of a Right-to-Sue notice on request.

DIRECTED AND LIMITED SCOPE INVESTIGATIONS

Limited scope Title VII Commissioner's charge investigations and directed investigations under the EPA and the ADEA should be initiated according to existing guidance and the local litigation implementation plans. Such investigations may be proposed either in the Rapid or the Extended Unit but will be conducted in the Extended Unit. The initiation of these investigations must be approved by the TMC. Pre-determination Settlement of these charges also must be approved by the TMC.

CONSOLIDATION OF CHARGES FOR INVESTIGATIONS

The supervisors of the Intake, Rapid and Extended Units and the TMC should monitor charges to determine whether multiple charges on the same basis and related issues are being filed against one respondent. When this phenomenon occurs, the charges should be consolidated in one investigation, where appropriate. A listing of all charges assigned to the Extended Unit should be available to the Intake supervisor in both the District and Area Offices.

THE ROLE OF TMC

The TMC shall be responsible for assuring that proper guidance is given to the compliance units for the screening and assignment of charges and complaints following their receipt. Additionally, the TMC will make decisions regarding the reassignment of charges from the Rapid to the Extended Unit or vice versa. The TMC should periodically review the status and progress of charges which have been assigned to the Extended Unit because they have litigation potential, and should seek to resolve any problems involving conflicting processing priorities, communication between the Legal and the Compliance Units, or similar matters which may affect the processing of charges and complaints.

The District Director is responsible for making staff assignments within the Compliance Units which further the development of potential litigation vehicles and for assuring that the inventory of pending cases is not unmanageable. The District Director should also assure that travel and other support funds which have been allocated to the office are appropriately distributed to accomplish the goals of the administrative charge process and the litigation program.

MONITORING CONCILIATION AGREEMENTS

It is anticipated that the number of cause determinations and letters of violations will increase as a result of these modifications. With this increase, there is a probability that the number of conciliation agreements will also increase. Activity by respondent pursuant to such an agreement must be closely monitored. Because the Extended Unit will normally have executed the agreemen, and because violations of conciliation agreements will constitute a possible litigation vehicle, the responsibility for monitoring conciliation agreements will be assigned to the Extended Unit (regardless of the unit in which the agreement was executed). Section 80 of the Compliance Manual will be revised.

[Exhibit B]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Washington, DC, September 11, 1984.

MEMORANDUM

To: Johnny Butler, General Counsel; Odessa Shannon, Director, Office of Program Operations.

From: Clarence Thomas, Chairman; Tony E. Gallegos, Commissioner; William A. Webb, Commissioner; Fred W. Alvarez, Commissioner.

Subject: Statement of Enforcement Policy.

The Commission believes that two critical features of an effective law enforcement program are certainty and predictability of enforcement in those situations where the agency has reason to believe that a law it enforces has been violated. Those critical features have never been fully developed by this law enforcement

agency. The Commission believes that Commission employees, charging parties and respondents should understand that the Commission has adopted the goal of pursuing through litigation each case in which merit has been found and conciliation has failed. The achievement of that degree of certainty and predictability in enforcement requires a unity of purpose on the part of all segments of the Agency. The purpose of this memorandum is to articulate this enforcement policy and to direct that you develop those mechanisms necessary to more effectively integrate and allocate the Commission's legal and investigative resources so that this agency can achieve that degree of certainty and predictability in enforcement which will more directly carry out our law enforcement responsibilities.

In support of this goal, the Commission has determined that every case in which the District Director has found that one of our statutes has been violated should be submitted to the Commission for litigation consideration if attempts at conciliation fail. In the implementation of this law enforcement policy, the Commission believes that the following points need to be clearly understood:

(1) The Commission will review for litigation consideration all reasonable cause determinations and all letters of violation where conciliation has failed;

(2) The reasonable cause determination or letter of violation requires input by the Agency's legal staff before the determination is made;

(3) The District Director is responsible for issuing all letters of determination and letters of violation. In so doing, the District Director will give serious consideration to the analysis, guidance and recommendation of all those providing input including the Regional Attorney.

(4) One finding of discrimination is no more "worthy" of litigation than any other finding of discrimination. Accordingly, the Commission believes that an enforcement philosophy or operational system which attempts to determine which among several meritorious findings is "worthy" of governmental resources is inconsistent with our statutory obligations. The National Litigation Plan is designed to focus attention on additional areas of special concern for litigation consideration. It should not be interpreted as a limitation on the consideration of meritorious litigation proposals which may fall outside the defined parameters of the National Litigation Plan.

The Commission, in support of these principles, directs the Offices of the General Counsel and Program Operations to develop jointly, for approval by the Commission, the appropriate administrative mechanisms which will implement the following procedures:

(1) The advice of attorneys should be sought, as appropriate, during the investigative process for all cases.

(2) Before the issuance of a reasonable cause determination or letter of violation, the District Director shall obtain from the Regional Attorney an analysis of whether the evidence supports such a finding in accordance with the following standard:

It is more likely than not that the Charging Party(s) and or members of a class were discriminated against because of a basis prohibited by the statutes enforced by the Equal Employment Opportunity Commission. The likelihood that discrimination occurred is assessed on evidence that establishes, under the appropriate legal theory, a *prima facie* case. If the respondent has provided a viable defense, evidence of pretext should also be assessed.

If the Regional Attorney is of the view that the evidence does not support such a reasonable cause finding or letter of violation the Regional Attorney shall specify in writing to the District Director the reasons therefor and those reasons shall be transmitted to the General Counsel for review following failure of conciliation.

(3) The District Director, after considering the Regional Attorney's recommendation, shall:

(a) Issue a determination of reasonable cause or letter of violation; or

(b) Obtain additional evidence; or

(c) Issue a finding of no reasonable cause or other appropriate closure.

(4) Following the failure of conciliation in every case where a reasonable cause determination or letter of violation has been issued, the District Director shall forward the case to the Regional Attorney. The Regional Attorney shall then forward such information as required by the General Counsel to the Office of General Counsel (Headquarters) for review and submission of a presentation memorandum to the Commission, through the Executive Secretariat. The General Counsel's submission shall include:

(a) The General Counsel's recommendation and any additional legal analysis;

(b) The Letter of Determination or Letter of Violation;

(c) The Investigative Memorandum;

(d) The Respondent Position Statement (or an indication that such a Position Statement does not exist);

(e) Notice of Conciliation Failure where applicable; and
(f) Copy of the proposed complaint.

The Commission expects that each required analysis shall be succinct and completed in an expeditious manner.

Please ensure that all employees receive a copy of this Memorandum.

[Exhibit C]

POLICY STATEMENT ON REMEDIES AND RELIEF FOR INDIVIDUAL CASES OF UNLAWFUL DISCRIMINATION

On September 11, 1984, the Equal Employment Opportunity Commission announced its intent to achieve certainty and predictability of enforcement in those situations where the agency has reason to believe that a law it enforces has been violated. In keeping with this goal, the Commission recognizes that the basic effectiveness of the agency's law enforcement program is dependent upon securing prompt, comprehensive and complete relief for all individuals directly affected by violations of the statutes which the agency enforces. The Commission also recognizes that, in appropriate circumstances, remedial measures need to be designed to prevent the recurrence of similar unlawful employment practices.

Predictable enforcement and full, corrective, remedial and preventive relief are the principal components of the method with which the Commission intends to pursue this agency's mission of eradicating discrimination in the workplace. Henceforth, in negotiating settlements, in drafting prayers for relief in litigation pleadings or in issuing Commission Decisions or Orders, obtaining full remedial, corrective and preventive relief is the standard by which the agency is to be guided.

The Commission believes that a full remedy must be sought in each case where a District Director concludes the case has merit and had, or is prepared to, issue a letter of violation or a letter finding reasonable cause to believe that one of the statutes the agency enforces has been violated. The remedy must be fashioned from the wide range of remedial measure available to this law enforcement agency which has broad authority under the statues it enforces to seek appropriate forms of legal and equitable relief. The remedy must also be tailored, where possible, to cure the specific situation which gave rise to the violation of the statute involved.

Accordingly, all remedies and relief sought in court, agreed upon in conciliation, or ordered in Federal sector decisions should contain the following elements in appropriate circumstances:

(1) A requirement that all employees of respondent in the affected facility be notified of their right to be free of unlawful discrimination and be assured that the particular types of discrimination found or conciliated will not recur;

(2) A requirement that corrective, curative or preventive action be taken, or measures adopted, to ensure that similar found or conciliated violations of the law will not recur;

(3) A requirement that each identified victim of discrimination be unconditionally offered placement in the position the person would have occupied but for the discrimination suffered by that person;

(4) A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination; and

(5) A requirement that the respondent cease from engaging in the specific unlawful employment practice found or conciliated in the case.

The components of these remedial elements are as follows:

(1) Notice requirement

All respondents should be required to sign and conspicuously post, for a period of time, a notice to all employees in the affected facility (or to union members if respondent is a labor organization), prepared by the agency on E.E.O.C. forms, specifically advising respondent's employees or members of the following:

(a) That the notice is being posted as part of the remedy agreed to pursuant to a conciliation agreement with the agency or pursuant to an order of a particular Federal court or pursuant to a decision and order in a Federal sector case.

(b) That Federal law requires that there by no discrimination against any employee or applicant for employment because of the employee's race, color, religion, sex, national origin or age (between 40 and 70) with respect to hiring, firing, compensation, or other terms, conditions or privileges of employment (Federal sector notices will include handicap as an unlawful basis of discrimination).

(c) That respondent supports and will comply with such Federal law in all respects and will not take any action against employees because they have exercised their rights under the law.

(d) That respondent will not engage in the specific unlawful conduct which the District Director believes has occurred or is conciliating, or which the Commission or a court has found to have occurred.[1]

(e) That respondent will, or has, taken the remedial action required by the conciliation agreement or the order of the Commission or Court.[2]

(2) Corrective, curative, or preventive provisions

In appropriate circumstances, a remedy must provide that the respondent take corrective, curative or preventive action designed to ensure that similar violations of the law will not recur. Similarly, corrective, curative or preventive measures may also be adopted in those situations where those measures are likely to prevent future similar violations.

Thus, where a policy or practice is discriminatory, the policy or practiced must be changed. Similarly, if a particular supervisor or other agent of the respondent is identified as knowingly or intentionally being responsible for the discrimination that occurred, the respondent must be required to take corrective action so that the discriminatee or similarly situated employees not be subjected to similar discriminatory conduct. This corrective action may be accomplished, for example, by insulating employees from that individual for a period of time, or by requiring the respondent to discipline or remove the offending individual from personnel authority, or by requiring the respondent to educate the offender and other supervisors so that they may overcome their unlawful prejudices. These and any other appropriate measures, or any combination thereof, designed to meet this goal should be considered when negotiating settlements or drafting prayers for relief. This type of relief is not to be designed for punitive purposes. Rather, this relief is to be tailored to cure or correct the particular source of the identified discrimination and to minimize the change of its recurrence.

In addition, the respondent must be required to take all other appropriate steps to eradicate the discrimination and its effects, such as the expunging of adverse materials relating to the unlawful employment practice from the discriminatee's personnel files.

(3) Nondiscriminatory placement

Each identified victim of discrimination is entitled to an immediate and unconditional offer of placement in the respondent's workforce, to the position the discriminatee would have occupied absent discrimination, or to a substantially equivalent position, even if the placement of the discriminatee results in the displacement of another of respondent's employees ("Nondiscriminatory Placement"). The Nondiscriminatory Placement may take place by initial employment, reinstatement, promotion, transfer or reassignment and must occur without any prejudice to, or loss of, any employment-related rights or privileges the discriminatee would have otherwise acquired had the discrimination not occurred.

If a Nondiscriminatory Placement position that the discriminatee should occupy no longer exists, then employment for which the discriminatee is qualified must be offered to the discriminatee in other areas of the respondent's operation. Finally, if none of the foregoing positions exist in which the discriminatee may be placed, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

It is essential that victims of discrimination not suffer further and the respondents not gain by their misconduct. Accordingly, the contention by a respondent that

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[1] For example, the following types of assurances could be required of a respondent which committed several types of unlawful employment practices in a particular case:

"XYZ, Inc. will not refuse to hire employees on the basis of their sex;

"XYZ, Inc. will not refuse to promote employees on the basis of their sex or their race; and

"XYZ, Inc. will not threaten to fire employees because they have filed charges with the Equal Employment Opportunity Commission."

[2] For example, employees could be notified of the relief obtained in the following way:

"XYZ, Inc. will promote and make whole the employees affected by our conduct for any losses they suffered as a result of the discrimination against them. Specifically, Mary Jones and Susan Smith will be promoted to the position of shift supervisor and will be made whole for any loss in pay or benefits they may have suffered since the time that we failed to promote them to that position.

"XYZ, Inc. has adopted an equal employment opportunity policy and will ensure that all supervisors in making selections for promotions abide by the requirements of that policy that employees not be discriminated against on the basis of their sex or race."

a discriminatee is no longer suitable for Nondiscriminatory Placement due to a loss of skills, a change in job content or some other reason is not an acceptable excuse for a respondent's failure to accomplish a Nondiscriminatory Placement of a discriminatee. The burden is upon the respondent to demonstrate that the inability of the discriminatee to accept Nondiscriminatory Placement is unrelated to the respondent's discrimination such that the victim, rather than the respondent, should bear the loss. Similarly, the burden is also on the respondent to demonstrate a contention that post-discrimination conduct by a discriminatee renders the discriminatee unworthy of Nondiscriminatory Placement.

In certain circumstances, the Nondiscriminatory Placement of a victim of discrimination may require the job displacement of another of the respondent's employees. If displacement of an incumbent employee in order to accomplish Nondiscriminatory Placement on behalf of a discriminatee is clearly inappropriate in a particular setting or is unavailable as a remedy in a particular jurisdiction, then the respondent must make whole the discriminatee until a Nondiscriminatory Placement can be accomplished.

(4) Backpay

Each identified victim of discrimination is entitled to be made whole for any loss of earnings the discriminatee may have suffered by reason of the discrimination. Each individual discriminatee must receive a sum of money equal to what would have been earned by the discriminatee in the employment lost through discrimination ("Gross Backpay") less what was actually earned from other employment during the period, after normal expenses incurred in seeking and holding the interim employment have been deducted ("Net Interim Earnings"). The difference between Gross Backpay and Net Interim Earnings is Net Backpay Due. Interest should be computed on all Net Backpay Due. Net Backpay Due accrues from the date of discrimination, except where the statutes limit the recovery, until the discrimination against the individual has been remedied.

Gross Backpay includes all forms of compensation such as wages, bonuses, vacation pay, and all other elements of reimbursement and fringe benefits such as pension and health insurance. Gross Backpay must also reflect fluctuations in working time, overtime rates, changing rates of pay, transfers, promotions, and other perquisites of employment that the discriminatee would have enjoyed but for the discrimination. In appropriate circumstances under the Equal Pay Act and Age Discrimination in Employment Act liquidated damages based on backpay will also be available.

(5) Cessation provisions

All respondents must agree or be ordered to cease from engaging in the specific unlawful employment practices involved in the case. For example, a respondent should agree to cease discriminating on the unlawful basis and in the specific manner alleged or a respondent might be required to cease giving effect to certain specific discriminatory policies, practices or rules. In circumstances where a particular respondent has committed or has conciliated several unlawful employment practices, consideration must be given to including board cessation language in an agreement or order which is designed to order the cessation of any further unlawful employment practices.

The Commission does not believe that the statutory requirement of conciliation requires the agency to abdicate its principal law enforcement responsibility. Thus, conciliation should not result in inadequate remedies. The possibility of pre-litigation conciliation does not constitute cause for unwarranted or undeserved concessions by a law enforcement agency when one of the laws it enforces has been violated. Rather, the concept of settlement constitutes recognition of the fact that there may be reasonable differences as to a suitable remedy between the maximum which may be reasonably demanded by the agency and the minimum which in good faith may be fairly argued for the respondent. Within this scope, conciliation must be actively pursued by the agency. In this regard, in all cases in which the District Director believes that one of the statutes the agency enforces has been violated or in which litigation has been authorized, full remedies containing the appropriate elements as set forth in this memorandum should be sought. In conciliation efforts, reasonable compromises or counterproposals to the full range of remedies described in this policy may be considered if those compromises or counterproposals address fully the remedial concets described in this policy. Conciliation should be pursued with the goal of obtaining substantially complete relief through the conciliation process. Any divergence from this goal must be justified by the relevant facts and the law.

[Exhibit D]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Washington, DC, April 23, 1985.

Hon. PAT WILLIAMS,
House of Representatives,
Washington, DC.

DEAR CONGRESSMAN WILLIAMS: We are writing in response to the recent letter in which you and 42 other Members of Congress expressed your "grave concern about the recent change in policy announced by the Equal Employment Opportunity Commission regarding the pursuit and litigation of systemic and individual discrimination cases." Your letter states that the "Commission has voted to move away from the notion that classes of people are affected by discrimination as inappropriate for the Commission to pursue," and that you "are concerned that this new direction may be a way for the EEOC to avoid pursuing class action cases."

It appears that there has been a grievous failure of communication between the Commission and the Congress, for we have *not* voted to move away from the notion that classes of people are affected by discrimination, and we do *not* intend to avoid pursuing class actions. What we have done is adopt two policy statements (copies of which we enclose) that, taken together, commit the Commission to pursuing full and effective relief, on behalf of every victim of unlawful discrimination, through individual and class actions, as appropriate.

This commitment does reflect a shift in policy, but one that should be welcomed by all who support vigorous enforcement of equal employment opportunity laws. In the past, the victims of unlawful discrimination were largely ignored by the EEOC. Even when the Commission found that discrimination had occurred, only rarely did it commence litigation—individual or class actions—to secure relief for the victim(s). In the overwhelming majority of cases, the Commission decided that the violation was not "litigation-worthy," and the victim was left no better off than if the EEOC had never been created. Last September, however, the Commission adopted a "Statement of Enforcement Policy," which provides, in essence, that the Commission considers all unlawful discrimination "litigation-worthy," and will bring individual or class actions, as appropriate, to secure relief for each and every victim of such discrimination.

The Commission in the past also tended to settle cases, before or during litigation, without securing meaningful or effective relief for the victim(s). To correct this, on February 5, the Commission adopted a "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination," in which we declared "that a full remedy must be sought in each case where a District Director concludes the case has merit and has, or is prepared to, issue a letter of violation or a letter finding reasonable cause to believe that one of the statutes the agency enforces has been violated." Full relief is to include, as appropriate:

"(1) A requirement that all employees of the respondent in the affected facility be notified of their right to be free of unlawful discrimination and be assured that the particular types of discrimination found or conciliated will not recur;

"(2) A requirement that corrective, curative or preventive action be taken, or measures adopted, to ensure that similar found or conciliated violations of the law will not recur;

"(3) A requirement that each identified victim of discrimination be unconditionally offered placement in the position the person would have occupied but for the discrimination suffered by that person;

"(4) A requirement that each identified victim of discrimination be made whole for any loss of earnings the person may have suffered as a result of the discrimination; and

"(5) A requirement that the respondent cease from engaging in the specific unlawful employment practice found or conciliated in the case."

In all cases—individual and class actions—the Commission will seek, through settlement or litigation, on behalf of each and every victim of unlawful discrimination, full and effective relief along the lines set forth above.

Furthermore, it has been, and continues to be, the policy of the EEOC to investigate and litigate "pattern or practice" charges and cases, under section 707 of the Civil Rights Act of 1964, as amended, in addition to pursuing other types of class actions. Indeed, in fiscal year 1984, the Commission spent approximately $10 million on the processing of "pattern or practice" charges, and we will be spending even more this year. Currently, there are 139 "pattern or practice" charges in various stages of processing in our field offices: 91 are in investigation, 19 of which were

authorized by the current Commissioners; 27 are in various stages of settlement; and we are monitoring 21.

We have dedicated 113 employment opportunity specialists, 20 clerical workers and six employment opportunity assistants (technical positions) to the development and investigation of "pattern or practice" charges in the field. In addition, 43 "pattern or practice" charges are in various stages of processing by our headquarters staff. We have dedicated 68 full staff years at Headquarters to investigate and litigate nationwide "pattern or practice" charges, and to provide technical assistance to our field systemic program.

We wish to note, however, notwithstanding this massive commitment of resources to our systemic program, that we do not agree with your suggestion that "pattern or practice" cases and other class actions "constitute the single most important deterrent to the the continuance of discriminatory employment practices." We believe that the most effective deterrent would be a Commission prepared to act quickly and strongly to vindicate the rights of any person who suffers unlawful employment discrimination, and we intend to make the EEOC such a body.

We appreciate your concern "that the budget of the Commission is inadequate to practically implement a comprehensive policy of pursuing individual cases." We have, however, paid careful attention to this question, and have concluded that our resources are sufficient to do the job. The average caseload of our lawyers in the field is now less than three, and therefore we believe that a very substantial increase in our litigation would be manageable. Should we prove to be mistaken in this regard, we would not hesitate to request a supplemental appropriation, and we are confident that the President and the Congress would support us.

Finally, we would like to express our regret that we did not inform the Congress directly about our new policies. This was an oversight, and we have taken steps to ensure that it will not recur. This communication failure was compounded, we believe, by articles misreporting these recent EEOC initiatives that appeared, among other places, in *The Washington Post* and *Time* magazine. We enclose a copy of the March 18, 1985, issue of *Time* containing a retraction.

We appreciate your interest in the Commission and we would be happy to discuss these matters with you further at your convenience.

Sincerely,

CLARENCE THOMAS,
Chairman.
TONY GALLEGOS,
Commissioner.
FRED W. ALVAREZ,
Commissioner.
WILLIAM A. WEBB,
Commissioner.
ROSALIE G. SILBERMAN,
Commissioner.

Enclosures.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, March 12, 1985.

Hon. CLARENCE THOMAS,
Chairman, Equal Employment Opportunity Commission,
Washington, DC.

DEAR MR. THOMAS: We are writing to express our grave concern about the recent change in policy announced by the Equal Employment Opportunity Commission regarding the pursuit and litigation of systemic and individual discrimination cases.

The Commission has voted to move away from the notion that classes of people are affected by discrimination as inappropriate for the Commission to pursue and to focus primarily on individual cases where discrimination has been proven. We are concerned that this new direction may be a way for the EEOC to avoid pursuing class action cases. This would be in direct contradiction of the original intent of Congress as embodied in Title VII of the 1964 Civil Rights Act and the 1972 amendments to that act and subsequent court interpretation.

In addition this is in violation of the will of the 98th Congress as expressed when funding for the systemic program was earmarked and increased over the 1984 level to $10.5 million for systemic program and staff.

The systemic program represents the federal government's commitment to maintaining work environments free of discrimination. The systemic program handles "pattern and practice" discrimination cases, including but not limited to class action

suits, in which an employer has discriminated against a group of employees because of their sex, religion, age, handicap, or national origin. Systemic or class action cases have the potential to help large numbers of employees and to serve as an important example to employers that the federal government will not tolerate employer discrimination. Of major importance is the fact that such actions constitute the single most important deterrent to the continuance of discriminatory employment practices.

Discrimination by its nature is systemic and affects entire classes of people. This makes the systemic program the most powerful tool of the EEOC and indicates how the recent shift in policy represents a significant deterioration of the enforcement program. Since the EEOC litigates fewer than 5% of the discrimination lawsuits in this country, it makes sense that the Commission focus on systemic cases.

In addition to representing an undesirable change in policy, we are also concerned that the budget of the Commission is inadequate to practically implement a comprehensive policy of pursuing individual cases. Limited resources may be spread too thin to litigate every case. With the current budget and staff, it would seem difficult for investigators to handle the expanded individual case load under the new policy.

We strongly urge the Commission to reconsider its change in policy. We remain committed to the adequate pursuit of the elimination of systemic discrimination and, of course, we will continue to follow its progress.

Augustus F. Hawkins, Chairman, Education and Labor Committee; Pat Williams, Chairman, Subcommittee on Select Education; Olympia J. Snowe, Co-Chair, Congressional Caucus for Women's Issues; Patricia Schroeder, Co-Chair, Congressional Caucus for Women's Issues; Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights; Matthew G. Martinez, Chairman, Subcommittee on Employment Opportunities; Claude Pepper, John Conyers, Jr., James M. Jeffords, Committee on Education and Labor; Edolphus Towns, Claudine Schneider, Bob Edgar, Howard Wolpe, Lane Evans, Mel Levine, Berkley Bedell, Bruce F. Vento, Ted Weiss, Silvio O. Conte, William Lehman, Sidney R. Yates, Barney Frank, Chairman, Subcommittee on Manpower and Housing; Fortney H. Stark, Bill Green, Thomas S. Foley, Marcy Kaptur, Vic Fazio, Jim Bates, John R. McKernan, Barbara B. Kennelly, Walter E. Fauntroy, Frank J. Guarini, Alan Wheat, Al Swift, Jim Moody, George Crockett, Barbara A. Mikulski, Mickey Leland, Chairman, Congressional Black Caucus; Charles A. Hayes, Bruce A. Morrison, Robert J. Mrazek, James J. Howard, and James L. Oberstar.

Mr. MARTINEZ. Thank you very much, Mr. Alvarez.

Mr. Williams, do you have any questions?

Mr. WILLIAMS. I will reserve my time, Mr. Chairman.

Mr. MARTINEZ. Mr. Gunderson.

Mr. GUNDERSON. Thank you, Mr. Alvarez.

I would like to begin, there has been a lot of contention and concern about the Commission's general pursuit of discrimination in the area of civil rights, equal rights, et cetera. And there seems to be an indirect correlation or connection between concerns about the Commission and concerns about the Department of Justice on civil rights.

Can you explain to this committee what connection there is in terms of the policies of the civil rights actions of the Department of Justice and the policies of your Commission?

Mr. ALVAREZ. This Commission makes its own independent judgments on which actions to pursue on cases that come within our jurisdiction, except for cases in the Supreme Court, where the statute says that the Justice Department determines what cases to take to the Supreme Court.

But we make our own independent judgment on how to enforce title VII in the private sector and in the Federal sector. Title VII requires that the Justice Department make enforcement decisions

in the State and local sector, but we are independent in our decisionmaking in the area in which we have jurisdiction.

Mr. GUNDERSON. Has there been any discussion between the Department of Justice and your Commission to try to adopt similar philosophies or similar goals, anything of that sort?

Mr. ALVAREZ. Well, at various levels, including staff levels and from Mr. Reynolds' level, we have communicated with each other about these issues, because we both enforce title VII, so there is communication, we are part of the same government.

But that is a fairly—it can occur on fairly routine cases, because we investigate some cases we send over there, which they have the ability to enforce. Plus when the Justice Department represents us in the Supreme Court, we have to discuss with them what our positions are, but they have the last call on what position to take in the Supreme Court.

Mr. GUNDERSON. But during the ordinary operations of the Commission, they have no ability or authority to direct the philosophy of the Commission?

Mr. ALVAREZ. No, they don't, except with respect to which cases they choose to pursue in the State and local jurisdiction area, because that is where the Congress says they enforce the statutes, but in the private sector, we make all those decisions, we the Commission, a five-member body.

Mr. GUNDERSON. Another area of concern, I think, to many people in the civil rights community has been the *Stotts* case. Would you care to comment on how your Commission has responded to that?

Mr. ALVAREZ. There have been three developments with respect to Stotts at EEOC. The first decisions that the Commission made, or the chairman made, was not to reopen any of our pending consent decrees to determine whether they were in compliance with whatever the *Stotts* decision held, and there is a tremendous amount of legal debate over what the effect of *Stotts* is, although it is fairly clear what they said.

We decided not to open our consent decrees up. Our general counsel did an analysis of the *Stotts* case, and determined, or recommended to the Commission that the *Stotts* case only applied—or didn't apply to any kind of prospective relief, but in fact, was limited to what the court called make-whole relief.

So, it adopted what might be termed the narrow reading of *Stotts*. And the Commission, as a body, has not moved to change any of that interpretation or has not issued its general policy statement about what it thinks the impact of *Stotts* is.

So that has been the development in the *Stotts* case, from the Commission's standpoint.

Mr. GUNDERSON. One of the other concerns raised by a number of people on the committee is whether or not the Commission, by undergoing the extent of view of different cases, individual cases, whether, number one, you can meet the workload that would be included in this.

Can you respond to that?

Mr. ALVAREZ. Sure.

We are working harder than we were a year ago. Let me just say a word about how the litigation authorization process used to work.

It used to be that we had these layers of lawyers who would shield the Commission from considering cases, but all cases that were authorized had to come to the Commission. It is not that we are saying that we are depriving anybody of previous authority to litigate.

We are trying to take out all the veto levels that used to exist at a staff level from pursuing cases where discrimination, or a reasonable cause that discrimination occurred, was found.

So, what we have done is we have opened up the pipeline from the field directly to the Commission. And we are having—the policy was just adopted last fall. It takes a while for things to get going.

But in the last several months, we have had a lot of work at the Commission. But we are working harder, meeting twice a week, considering many more cases, and so far as we have been told, they are not creating a backlog of any kind. We are just doing more work on authorizing cases.

And a large number of new cases are coming in that would have been filtered out in the past through these layers of review. So, from my standpoint, and I think from my colleagues on the Commission's standpoint, I can say we are working harder, but it is not overwhelming us. If it does, we will have to come up with other ways to authorize or not authorize those cases.

Mr. GUNDERSON. There has been questions that your remedy and relief policies are too inflexible, due to the fact of the Commission's "full relief" for the victim of discrimination.

Could you define for us what the Commission means by "full relief" and respond to the charge that you are too inflexible?

Mr. ALVAREZ. The remedies policy was set forth and described, I think, very clearly, as what our field people should seek when they find discrimination, the basic elements of what we think full relief is.

But we do recognize that we have a statutory and a practical obligation to conciliate cases, and the remedies policy itself contains very flexible language about conciliations, because we have an obligation to both from a statutory standpoint and an operational standpoint.

So it is not an inflexible policy. We are just telling our field people, in response, in partial response to criticisms that we were seeking to wholly inadequate relief, that this is what we think the whole relief package should contain, and that is what they should seek.

In settlements, however, they need to keep their eye on those issues, but engage in reasonable compromises with the opposing party, between what the most we could ask for and the least we could get. And that is what the conciliation process is all about.

I, frankly, don't understand why this policy is being read as being so inflexible. The last paragraph of the policy has what I consider to be plenty of flexibility written into it.

But I do acknowledge that some people have read it as being too inflexible. We have communicated to our staff not to be inflexible about it, but it is a process of continuing to spread that word that we have to do, and I appreciate your question.

Mr. GUNDERSON. Thank you.

Thank you, Mr. Chairman.

Mr. MARTINEZ. Thank you, Mr. Gunderson.

On that note, let me go over some of the conversation we had in my office. Mr. Gunderson's questioning was really based on a lot of our discussion that we had in our office. And I am glad.

But let's go over that again. Now, we asked you in our office, if a full offer is required for conciliation to be considered, and in that conciliation a negotiation to a final resolution, before any other action is to be taken. You said that wasn't the intent of the policy, but you admitted that that was the way it was being read. You said that if it were being read that way, then there would have to be some clarification, even in changing the verbiage so that it wasn't interpreted that way.

And I had thought, and correct me if I am wrong, that we did have an understanding on that.

Mr. ALVAREZ. Yes; I think we did. I think you expressed to me something that Congressman Gunderson raised, and that we have heard in other places, that this is too strong, and I expressed to you that we need to communicate to our staff people more that the policy is a goal, sets forth the five goals we wish to seek, and that they have plenty of flexibility.

So, I don't, I am saying anything different than what I said to you, Congressman.

Mr. MARTINEZ. Then let's get specific. Is it not, right now, under the policy that exists, required that the employer make the full offer before conciliation?

Mr. ALVAREZ. No.

Mr. MARTINEZ. All right, that is not the way it is. Well, do you have the passage that states that?

It says required. And that is the word, you see. We get hung up on words, and a lot of times it is very difficult to get away from a word, because a word means a certain thing and required means required.

Mr. ALVAREZ. Well, I will certainly review it, and if that implication is left by the words, then I will ask the chairman of the Commission to consider a clarification on that point, but as I recall it, it said this is what we should seek as we enter the conciliation process.

The last paragraph, I would point out to the subcommittee, I think contains plenty of flexibility in it, and it states, I think accurately, what our conciliation obligation is under the statute.

Mr. MARTINEZ. Let's say you are a biased person, reading that, and you want to hang your hat on something. If there were contradictory statements in there, and one is "required," the other one is "giving flexibility," which one would you hang your hat on?

You are going to hang your hat on the one that is indicated first, and that is "required," and you'll stick to that, regardless of what the last paragraph states.

And that is why I say, you really have to—if you are going to be fair and objective, and if you are going to be effective in the enforcement of the agency, then you have got to understand that you can't have words in there that can be misinterpreted.

That is all I am saying.

Mr. ALVAREZ. I understand that. There is another consideration here, Mr. Chairman. We have been continually criticized over the years by this subcommittee and by the GAO for getting inadequate settlements in the conciliation process.

We attempted to write words that would raise the level of what our people would attempt to seek. That is the point behind the remedies policy. So, we needed—I mean, it is a language thing. We needed to raise the level somewhat. But there is a balance there.

And if we are going to give flexibility to our field people, when this thing was adopted, I considered the problems you are discussing, it seemed to me that there was enough flexibility there.

But I would be happy to go back and reconsider that if there are particular parts of it that you think give the wrong impression. I would be happy to consider that and raise it with my colleagues.

Mr. MARTINEZ. Well, it evidently does, because it is happening out there. People are getting strung out and sometimes ending up with nothing when they could end up with something if the wording wasn't so rigid. We discussed that in great detail.

One of the things that we have to understand is that, unlike a criminal case, where a complaint has been lodged by an individual, then the prosecution the Justice Department in that local area, is required by law to pursue whether that person wants to withdraw that complaint or not.

That is not the case here, which is for the satisfaction of that person who has been discriminated against for relief from that discrimination. It should be up to the victim to say when enough litigation is enough, despite how the EEOC feels about it.

You need to ensure that that practice does not occur by that company or employer again. I think that we need to consider the individual who is the victim here.

Mr. ALVAREZ. And I think we will and I think the policy permits that, Mr. Chairman. We also need to remember that we are a law enforcement agency, and the Federal Government has an interest in any discrimination that occurs, and we may have an interest that goes beyond that of what actually occurred to a particular people.

Mr. MARTINEZ. To assure that it doesn't happen to someone else.

Mr. ALVAREZ. That is true. That is what law enforcement is all about. And that is what we are attempting to do through the remedies policy.

Mr. MARTINEZ. Now, I am also concerned about the status of the adverse impact test within the framework of all discrimination laws under EEOC's jurisdiction. Can you tell me what the EEOC test is in evaluating discrimination, what their test is for evaluating?

Mr. ALVAREZ. Where there are several established theories of discrimination that the EEOC uses and applies, and the courts use and apply, one of which is called the adverse impact analysis, that arises out of an interpretation of one of the parts of our statutes in the *Griggs* case.

Beyond that, I am not sure what you would like me to say.

Mr. MARTINEZ. Well, I have heard that the only intentional discrimination standard of proof is now sanctioned by the EEOC——

Mr. ALVAREZ. I am not aware of that, that the Commission has abandoned the use——

Mr. MARTINEZ. Would you find out for us?

Mr. ALVAREZ. Sure. I meet with the Commission every week, and I am not aware that we are not using adverse impact analysis in the enforcement of this statute.

Mr. MARTINEZ. Mr. Henry.

Mr. HENRY. Thank you, Mr. Chairman.

I want to return very quickly to the full remedy issue, because I think this may be really, may be honest disagreement, or may be something sneaky going on here, so let's just clarify it, because once it is clarified, I think if it is properly clarified, we may have resolved one of two or three outstanding issues here.

In the present or previous conciliation process, you have four standards for—you had—in the affected facility where discrimination was found, be notified of their right to be free from unlawful discrimination.

Second, requirement that corrective, curative, protective action be taken; third, accord each identified victim of discrimination be made whole; and fourth, a requirement that respondent cease engaging in specific unlawful employment practice.

Now, in past policy, did you take that—when that was the definition of full remedy, was full remedy the negotiating posture you went into, and in many of your cases, did you split the difference, or is a conciliated closed case based on all four of those principles consistently, past policy?

Or would you many times with both sides agreeing to negotiate the difference?

Mr. ALVAREZ. I think, unfortunately, more often than not, and we have been roundly criticized for that, we were willing to let cases settle for anything that the charging party, who was often—has less bargaining power, would accept, including such things as clean up my personnel file.

Mr. HENRY. OK, so, in past policy, and we could get that clearly from the record just by reviewing determinations and closed cases, does the statute, say, require as the formal language that you have—your testimony says require—are we actually backing off from the statute?

If you once agreed this is filed, would you technically be latched into the requirement? Have we all kind of, on both sides—facilitates dispositions and—do you understand what I am saying?

Mr. ALVAREZ. I am sorry, Mr. Henry, I just don't. I don't understand where the word "require" is coming from.

Mr. HENRY. Well, from your testimony, in the communication. I think this is really what has us concerned, because now we are adding a fifth requirement. Now, that can do two things, particularly if you are meaning require.

While on the one hand, you can say it increases the bargaining of the plaintiff, the person filing, and that for us would be very admirable, the likelihood of successfully closed cases will diminish tremendously.

That is a very real concern, and if we are shifting to—you said in your testimony it would strike the negotiating hand, but the word you used is a requirement. I think it is just as important. If it is

simply to increase the negotiating posture, the chairman might be very, very enthusiastic about this.

But if we are slipping into a situation where you can't get informal settlements agreement to by both parties, then we may be actually slowing down the whole process and forcing everything into formal litigation in the judiciary, and creating a real morass.

The other aspect that I have to raise on that is the requirement that an identified victim be offered placement in the position, I would expect might even divide the civil rights community even on the merits, because it would have perhaps an impact of them adversely affecting innocent third parties that are subsequently removed from positions and fan the flames of resentment in local communities wherever enforcement action takes place.

That is very difficult—we face that in all our communities, in various affirmative action orders and so forth. But it is a very, very difficult issue, and it may be counterproductive relative to it.

Having said that, and since, obviously, you are not sure of yourself, I won't pursue an answer, but I think it is an answer that has to be given to resolve the question, and maybe staff has got the formal legal language.

The other thing I wanted to point out, on the class action, I think you have clarified that issue somewhat, and I would suspect, and you may wish to comment, that one of the reasons for some of the class action——

Mr. MARTINEZ. Would the gentleman yield before you——

Mr. HENRY. Fine, if I may get on to the next point.

Mr. MARTINEZ. On that last point, I have before me the policy statement of remedies and relief for cases of unlawful cases of discrimination approved by the Equal Employment Opportunity Commission. There, it does provide, like you said in your statement a requirement that each identified victim of discrimination be made whole for any loss of earnings of the person, and that he be placed in the position he would have been if not for the discrimination.

Now, when you require that offer before a victim can go any further, and the only other remedy now to that is litigation, which is a long, drawn-out situation in which case the grieving complainant might lose, he may not get anything. Whereas on the other hand if you do not have that requirement you might be able to negotiate the case out, to achieve something that would be agreeable by the employer and to the employee.

Mr. ALVAREZ. Mr. Chairman, I understand your point we discussed about. But the remedies policy says the Commission that a full remedy must be sought in each case.

Mr. MARTINEZ. Must be sought.

Mr. ALVAREZ. And agreeing with Congressman Henry, this is what we want. Now, let's hear what the counterproposal is. And then if you look at the last paragraph, it says we encourage that settlement process. You are telling our people, ask for this.

Mr. HENRY. We could solve the problem very quickly if they would be willing to clarify that statement, I mean that would solve the problem.

Mr. ALVAREZ. Pardon?

Mr. HENRY. If you clarify this, that would sure solve the problem very quickly.

Mr. MARTINEZ. That is right, and that is what we discussed. You have got to clarify that problem. Because as long as it sounds like that person must be placed before any conciliation effort can take place, you are never going to get to that point without going to litigation, and thereby creating a longer, drawn-out process.

Mr. ALVAREZ. That really is not our policy.

Mr. HENRY. Then there would be no problem if you could work out the language.

Mr. MARTINEZ. I yield back the time.

Mr. HENRY. I am sorry to interject, but I really do think we may have a misunderstanding over nothing, but it is a very significant issue, in terms of the impact of your agency. And if, as you have just suggested, that is seeking and putting you in a bargaining position of that past practice, you have negotiated settlements short of full remedy.

And that this would still allow for negotiated settlement short of full remedy, you are going to save yourself a lot of grief by very quickly getting that all clear.

The second——

Mr. MARTINEZ. Would the gentleman yield one more time?

Mr. HENRY. Yes.

Mr. MARTINEZ. And, two, it could really speed up the process in which your original part of your statement indicates you are trying to do.

Mr. ALVAREZ. Sure.

Mr. HENRY. If you do this you would be a hero to the chairman, quite frankly.

Mr. MARTINEZ. And a hero to the people you are trying to serve.

Mr. HENRY. You may also have to have a——

Mr. ALVAREZ. We would like to be.

Mr. HENRY [continuing]. Problem where you make whole the worker that is potentially relieved or lose his position and promotion under the requirement number three.

And you are going to have some findings very quickly there, that because an employee was illegally hired in violation of the civil rights statutes, was subsequently removed under one action, is going to come back to you for another one.

You may just want to look at that. I want to look at the class action issue. I would suggest that, I am assuming that one of the reasons class action came about was not because you could, obviously, combine and at least partially make whole vast numbers of people very quickly, but most of these suits, I would presume, are with major corporations, AT&T, IBM, I am thinking of some of the big ones.

Mr. ALVAREZ. Right.

Mr. HENRY. But, am I right in assuming that the major corporations, your larger corporations, probably are more sophisticated and in greater compliance, by and large, than smaller businesses?

And there may, in fact, be some positive aspects from the civil rights enforcement standard in moving further away from class action, in terms of getting into those employment communities that have, in fact, because of the emphasis on class action, been less willing to adjust employment practices.

I mean, I would think, in my community, and I think in most communities, the larger corporations, because they have been tagged and stung, and because the potential problems for themselves are so massive, I think if not out of good will, out of legal necessity, have moved much further than small- and medium-sized businesses that still qualify for filing agreements.

And it may be that you would really be pushing yourself into a new frontier of civil rights enforcement.

Mr. ALVAREZ. I think that is a good point, Congressman. We have taken on all the biggies in the country, and we are currently taking one on right now, but we are also using the pattern and practice and class action device against biggies, but not that big.

I mean, our program is going after anybody who engages in the pattern and practice, whether it is a small company, middle company, or a giant company, but we have an ongoing program against the big companies.

Some of those cases are currently in conciliation, and we are in litigation in one of them right now.

Mr. HENRY. Mr. Chairman, I don't know if I have any time left, but one more question.

Mr. MARTINEZ. I was about to tell you your time was up.

Mr. HENRY. OK, thank you.

Mr. MARTINEZ. Mr. Williams?

Mr. WILLIAMS. Thank you, Mr. Chairman.

Commissioner, perhaps, as has been indicated here, there is simply a need for better communications between the Commission and the Congress; that in fact, some of the concerns we have are just the result of our misunderstanding of the Commission's intention, but I must say that I don't think that is the case.

The Commissioners alluded to that in a letter which I appreciate you placing in your testimony, and referring to in your testimony. That was a response to me and the 42 other Members of the House who joined me in expressing our concern to Chairman Thomas and the Commission with regard to what we saw as a movement away from aggressive pursuit of systemic discrimination.

In your response to me, you indicate that there has been no movement away from pursuing systemic discrimination, but rather say there is a "grievous failure of communication" between the Commission and the Congress.

So let me try to wipe away that lack of communication here. Does the Commission accept what many of us believe to be the fact that discrimination affects, in this country, entire classes of people; that is, it affects people in a given age bracket, or it affects people of a given skin color, or of a certain religion?

Does the Commission accept that throughout American history, and still today, discrimination tends to follow those lines?

Mr. ALVAREZ. I am almost certain that it is. I know that I do, in every discussion I have had with other Commissioners on this point, they understand that discrimination is based on a category based on the irrelevant classification like race or age, and therefore, the answer, I think, is yes.

Mr. WILLIAMS. Has the Commission made a conscious decision to pursue individual discrimination cases rather than aggressively pursue systemic discrimination cases?

Mr. ALVAREZ. Not that I am aware of.

Mr. WILLIAMS. Does the Commission, given the fact that it does accept the systemic nature of discrimination, believe that systemic action is the best way to thwart such discrimination?

Mr. ALVAREZ. The Commission believes in taking on discrimination wherever they find it. Sometimes we get individual claims that a particular person was denied a job through prejudice, sometimes it affects more than one person.

Sometimes it is what you might call a pattern and practice case. All three of those methods—sometimes there are policies that affect more than one person. All three or four of those methods are methods that we have an obligation to pursue.

Mr. WILLIAMS. Chairman Thomas has expressed to me his opposition to the use of statistical disparities in identifying discrimination cases. Does the Commission agree with his opposition?

Mr. ALVAREZ. Well——

Mr. WILLIAMS. To the use of statistical disparity?

Mr. ALVAREZ. The use of statistics is available in two separate analyses under title VII. One of them is pattern and practice, where statistics are used to show the trace and pattern of disparate treatment.

And statistics are also used under adverse impact analyses. The Commission has not stopped using those forms of analysis. So that would be my answer to you. I don't know what the full content of your conversation was, or what the chairman said, but I would respond to you from the Commission level that way.

Mr. WILLIAMS. The chairman has also indicated that systemic suits or class action suits are not particularly effective. Does the Commission agree with him on that?

Mr. ALVAREZ. Well, assuming that that's——

Mr. WILLIAMS. In pursuing systemic discrimination.

Mr. ALVAREZ. The Commission is currently pursuing a number of systemic cases, including one of the largest ones ever brought in the country, so I guess the answer is that we don't agree with the statement as you have just recounted it, Congressman.

Mr. WILLIAMS. I am attempting to recount the chairman's statement to me a few months ago accurately, and I hope I am.

Well, let me just remind you that among the 42 Members who expressed, by signing my letter, some of the concerns which I have expressed to you this morning—are the chairman of this subcommittee, the chairman of the full Committee on Education and Labor, the ranking Republican member of the full Committee on Education and Labor, the chairman of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, and the two cochairs, one Democrat and one Republican, of the Congressional Caucus for Women's Issues.

If there is only misunderstanding between the Congress and your Commission, it is widespread among a number of very prudent, cautious, concerned, and dedicated Members of this Congress who have attempted, vigorously, to understand what it is you are doing with regard to vigorously pursuing systemic discrimination. We are unable to come to the conclusion that your pursuit is very vigorous.

I don't know what more to say, Mr. Chairman, except express that opinion, but I would be pleased to hear you respond.

Mr. ALVAREZ. We responded, all five members took that letter that you sent to us, Congressman, very seriously. We responded to you as quickly as we could, considering that we are a five-member organization.

We attempted to deal directly with the concerns expressed in that letter, and we sent you that letter. I think that is a good-faith response to the concerns, and there may have been a legitimate misunderstanding about what our policy is, but we attempted, as clearly as we possibly could, to respond to that letter.

And I guess the question is, What basis is there for disbelieving that letter? We have attempted every way we could to dispel the misnotion that we are not pursuing any particular kind of case.

We have responded to the newspaper, we have responded to Time magazine, we responded whenever the question is raised. And we responded to the 48 Members of Congress. If there is any other information that we can give you, we would be happy to work on it.

But beyond doing what we have done, I just don't know what we can do.

Mr. WILLIAMS. Well, Richard Nixon used to be fond of saying, "Don't watch what I say, watch what I do." And that is what the Congress is doing with regard to the Commission's actions.

Thank you.

Mr. ALVAREZ. We welcome that review.

Mr. MARTINEZ. I think that is the best thing we can do, is watch what happens. We have had some discussions on some of the things that I felt were a little too restrictive in your pursuit of enforcement, such as not allowing the complainant to exercise some input into his own situation.

I have one last question to ask you. Will we be having input into what you are doing? We are wondering if the EEOC will be reversing any policy in these areas, and when those changes occur, will our subcommittee have an opportunity to comment on these rule and policy changes before the EEOC enacts them?

Mr. ALVAREZ. Well, I don't understand the process very well of the adoption of changes of policies, and the notice and publication, and this subcommittee certainly knows how to reach us, and has regularly communicated with us.

Mr. MARTINEZ. I am glad you brought that up.

Mr. ALVAREZ. I assume that you will.

Mr. MARTINEZ. Well, it seems like we have a problem. The Commission may be feeling one way, the four members and the Chairman another way. We have recently communicated with the Chairman in adequate time, according to his guidelines, for his appearance or the appearance of someone on the Commission to the hearings are being held.

In response to me in the letter, totally ignoring his acknowledgement of the receipt on the date of that letter, he stated that the subcommittee had not complied with his advanced notice of 3 or 4 weeks. He got the letter 4 weeks before the scheduled hearings.

And yet, he says he wasn't given adequate notice in keeping with what he considered the proper notice procedures from our committee.

So we have a problem there, and it is one of communication, and maybe it is just with the Chairman.

Mr. GUNDERSON. Mr. Chairman?

Mr. MARTINEZ. Excuse me, let me finish. But I am hoping that that will be eradicated, that we can then have a dialog and we can have an opportunity to have input without someone stating falsely that we didn't communicate. We are attempting to communicate in having these hearings, that is one way.

For example, I just noticed—let me take an opportunity to introduce another Commissioner who is present, Tony Gallegos, who is a friend and a fellow Californian. Tony, thank you.

Mr. ALVAREZ. Mr. Chairman, I am sorry. Could I also introduce Mr. Bill Webb, and is Mr. Silberman here? No.

Mr. MARTINEZ. I am glad to see the commissioners came down to listen to the hearing. But like I say, open communication is important, and I agree with you that there should be an attempt by the Commission in total, including the Chairman, to have open dialog with the Committee and the Congress.

Mr. Gunderson.

Mr. GUNDERSON. I just think it is important that the record state, Mr. Chairman, that the concerns that the Chairman of the Commission had in regards to the scheduling of some Commissioners to testify before this subcommittee was not the question of adequate notice, it was a question of trying to work out mutually agreed-upon dates.

That has been the practice in the past, we sit down and try to resolve that, and the Chairman would like that practice to continue. And I have to tell you, Mr. Chairman, with all due respect, the minority is having a great deal of difficulty getting advanced notice and any cooperation in the scheduling of this subcommittee.

I have raised that issue with you time and time again, and if we are going to make the issue of scheduling a controversial issue that we are going to bring up at this hearing, then I am going to make it the entire issue.

Mr. MARTINEZ. I look for a total clarification as far as negotiating the dates. We gave them several dates, any one of which of those dates he could have set. There wasn't a single date that was given. There were several dates given, and the letter indicates that several dates were given. No Commissioner could be present today except Mr. Alvarez, and all of the sudden we have three, I understand, at least three.

Let's be honest.

Mr. GUNDERSON. Let's be honest, Mr. Chairman. Let's read from their letter. In this particular case, the Commission's Office of Congressional Affairs received on June 20, that is less than 1 month ago—you said this was a long time ago—a letter only indicating that the committee wished the Commission to testify on July 11.

There were no advance discussions between the Office of Congressional Affairs and the committee staff, no attempts were made by the committee staff to determine if the Commissioners would be available on that date.

Mr. MARTINEZ. I don't want to get into a long, drawn-out debate about the letter, but if you look at the dates on the letter, he said 3 to 4 weeks. It was 3 weeks before the letter was actually received,

he said 3 weeks' to 4 weeks' notification, but 3 weeks before that, we called his offices on the phone, not once but twice, so what my reference is, is to the inaccuracy of the statement that he didn't have adequate notice before that July 11.

But we also notified him at the time that there would be other hearings, and in a letter that we sent him in which there was a response to that letter, we indicated that we were unhappy with his letter. We rebutted the statements in his letter, and he subsequently sent a letter that they would be happy to participate in future hearings.

Mr. GUNDERSON. Mr. Chairman, I only indicate to you, I can't speak for Mr. Thomas, but I can indicate to you that the minority is having a great deal of difficulty in working with the majority in scheduling in this subcommittee, and if we are having that problem as colleagues, I have to assume that other people on the Commission and elsewhere might also be having that same problem.

Mr. MARTINEZ. Well, the subcommittee has made it a practice to give notice 4 weeks in advance, and we have pretty much held to that.

I would ask again today, if one of the Commissioners would be able to be here on the 23d, since several of them were able to make it today. I am hoping that one of them will be able to make it on the 23d.

Thank you, Mr. Alvarez, for your testimony. Would you like to say something else?

Mr. ALVAREZ. I just wanted to say, with respect to this particular hearing, I don't want to—not attempting to get into the debate between you two, but with respect to the Commission, our invitation date is July 2 for this hearing, is addressed to the chairman, says, "I would like to extend the invitation to you, and if you are unable, please ask Commissioner Alvarez or Commissioner Webb to present the Commission's position."

Commissioner Alvarez is here, and Commissioner Webb is here as well, so we have not declined to come to this particular hearing.

Mr. MARTINEZ. No, I didn't mean to indicate that.

Mr. ALVAREZ. OK.

Mr. MARTINEZ. Thank you, Mr. Alvarez.

Our next panel consists of William Robinson, executive director, lawyers' committee for civil rights under law; Nancy Kreiter, research director for the Women Employed Institute.

Your statements, if they are written, and received by us, will be entered into the record in their entirety. If you can summarize, again, the members will be under the 5-minute rule for questioning.

Mr. Robinson, would you like to begin?

STATEMENT OF WILLIAM ROBINSON, EXECUTIVE DIRECTOR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ACCOMPANIED BY RICHARD T. SEYMOUR, DIRECTOR, EMPLOYMENT PROJECT, AND NANCY KREITER, RESEARCH DIRECTOR, WOMEN EMPLOYED INSTITUTE

Mr. ROBINSON. Yes, sir. First, Mr. Chairman, I would like to thank you and members of the committee for the opportunity to be present this morning to share with you our views.

I have with me this morning Richard T. Seymour, who is director of the employment project of the lawyers' committee for civil rights under law. Mr. Seymour is one of the foremost experts on title VII in the country, and, with your permission, I would like to ask that he be allowed to assist me in the answering of questions.

Mr. MARTINEZ. Absolutely.

Mr. ROBINSON. With that, I would like to, then, summarize my testimony. I would like to touch only on parts of it, because it is lengthy testimony, and I know that you do have other matters that you need to attend to.

First, I would like to address the EEOC's September 11, 1984 Statement of Enforcement Policy. In that policy, the EEOC stated that it intends to file suit in every case in which reasonable cause was found, and conciliation had failed, and that one finding of discrimination is more worthy of litigation than any other finding of discrimination.

Before commenting on that specific point, let me indicate that in that policy statement, they purpose to achieve that goal, in part by having the individual Commissioners personally review every failure of conciliation.

I understand that normally, there are approximately some 2,000 failures of conciliation that occur around the country each year.

So, my first comment about this new policy is that that simply doesn't make good sense as a matter of sound management. What happened previously was that the failures of conciliation were reviewed by lawyers pursuant to policy guidelines set by the Commission and the general counsel, and they were supervised and reviewed as to their pursuit of those policies. That makes sense.

It does not make good management sense to have Presidential appointees reviewing each and every failure of conciliation. I might add that the lawyers who review those failures of conciliation out in the field are looking for good cases. That is how they get promoted. That is how they develop a professional reputation as being competent lawyers.

They are not intentionally throwing away good cases. So it just doesn't make sense for the EEOC to try to increase its enforcement of the statute by having Presidential appointees look on the junk heap of rejected cases that had been reviewed by GS-13 lawyers. That just does not make good management sense.

My opening salvo, then, is to suggest that the EEOC abandon that policy and rather establish an appropriate set of priorities, set of guidelines and instructions to the field for the implementation of those priorities, and have the Commission then oversee the development or pursuit of its policies, rather than have it do staff level

work of the lowest kind, or that can be done by personnel on lower echelons, I don't mean the work is of a less kind.

Now, coming back to this goal of filing suit in every case in which reasonable cause was found, because no one finding of discrimination is more worthy of litigation than any other. That just is not sound as a matter of common sense.

Some cases involved thousands of employees, while other cases involve either only one or a small handful of employees. The case involving the larger number of employees is obviously more important and more worthy of litigation than the case involving a small number or only one employee.

Moreover, some cases involve employment policies or practices set by a company, nationwide, or practices that are followed by numerous companies throughout the country. That case is clearly more important and more worthy of litigation than a case which involved the arbitrary and bigoted action of the single supervisor against a single individual.

So, the statement of policy theory is just simply not sound. It should be reconsidered and replaced with a more sound policy.

Moreover, EEOC simply doesn't have the capability of litigating every case in which reasonable cause is found and conciliation has failed. That is obvious from the number of cases that they are litigating now, or that the agency has ever been able to litigate.

To attempt to go from a couple of hundred cases a year, to a couple of thousand would risk the type of disaster that was exemplified by China's great leap forward.

Next on this point, we fear that in pursuit of these policies, what the agency will do is look to attorneys in the district and regional offices to be handling individual cases and will look to the attorneys in the systemic unit to be the only ones handling systemic cases.

This would not be sensible. Many systemic cases involve local plants or facilities, and are best handled on a local basis. Every EEOC attorney, whether in a local office, or headquarters, should be looking for worthwhile systemic cases to file.

Let me next move to a few comments about EEOC's February 5 policy statement on remedies and relief for individual cases of unlawful discrimination.

Some parts of the statement are quite well taken. And we commend the agency for making the effort. However, we fear that the statement, taken as a whole, will hamper the Commission's effort to obtain compliance and will so intense racial and sexual dissension in the workplace.

The policy, for example, requires that a victim of discrimination be given an immediate, unconditional offer of placement in the position denied, even if this means the bumping of an innocent white employee or male employee.

First, this is relief that simply hasn't been authorized by the courts, and in my opinion will not be made available by the courts. Indeed, in the *Stotts* case itself, which I will go into a little bit more in just a few minutes.

The Supreme Court expressly noted with favor the many lower court decisions denying relief in the form of bumping. If EEOC were to pursue this and actually obtain, what they are going to do

is have to pick black workers against white workers, male workers against female workers, quite unnecessarily so, because there are other forms of equitable relief which would accomplish the ultimate goal, and would not create that kind of dissension.

That policy contained in their remedy package ought to be deleted and replaced with traditional court-approved-type remedies.

Next, the policy statement indicates that full relief, as the statement defines it, must be obtained in every case in which a finding of reasonable cause is made. While there is some ambiguity in the policy statement, taken as a whole, it suggests too much rigidity to give employers an incentive to conciliate a charge or settle a case and it does not allow the Commission's staff to moderate settlement demands in light of the relative chances of success if the matter were to be litigated to trial.

I note that during the testimony of Commissioner Alvarez there was some discussion as to whether or not this policy in this statement allowed for the kind of flexibility that we all know is necessary in compromise, whether he is talking about a lawsuit or any other kind of compromise.

After that, I merely make two comments. One, I refer to the statement itself on the first page, and I quote from the second paragraph, the last part of that concluding sentence in the second paragraph:

> Obtaining full remedial, corrective and preventive relief is the standard by which the agency is to be guided.

Second, Commissioner Alvarez appeared on a panel last week out in Cincinnati with Mr. Seymour and there he said quite plainly that the relief outlined in the policy statement must be obtained in every case. Again, at the very least, there is ambiguity. That ambiguity ought to be corrected—I'm sorry. It was a month or so ago, rather than just a couple of weeks when Commissioner Alvarez appeared with Mr. Seymour. But nonetheless, at the very least there is ambiguity as to whether the EEOC conciliators and attorneys have the requisite degree of flexibility that they need in order to be able to settle cases obtaining substantial relief consistent with the facts of the case and the law applicable to those facts.

We urge that they go back to the drawing board and insert into the policy statement that required flexibility in a way that there is no ambiguity about it. Next, the policy statement doesn't mention one of the standard forms of relief in fair employment cases, that is, requirements that employers keep records sufficient to demonstrate compliance. The keeping of records is indeed one of the most important provisions, because that allows you to go back later on and to monitor your settlement and determine whether or not, in fact, there has been compliance.

The fact that you can indeed monitor and tell whether or not there has been compliance is one of the strongest inducements to actual compliance. It is a terrifically important provision that is not present now. As they revise this document, it should be included. I mention there are some good things about it. Let me just comment on a few of those. I don't want to seem entirely negative.

We support the idea of posting notices of violations found and of remedies provided. A number of the decrees we have obtained in-

clude such a relief and have worked quite well because of it. We support the idea of removing victims of discrimination from the supervision of individual perpetrators of subjective discrimination where such supervisors are identified. We support the expungement of discriminatory references from personal files. We support the back pay provisions of the policy statements.

We cautioned that the Commission should not reject reasonable compromises because one of these elements is lacking. The reasonableness of the settlement package as a whole should be the guide. Next, I want to comment briefly on the *Stotts* case. My point here is that the Commission should expressly reject the Justice Department's overbroad reading of the *Stotts* case to provide guidance to its employees and those subject to its jurisdiction as to its views of *Stotts* which views should conform to the court decisions.

About *Stotts*, as you know, the Justice Department has read the *Stotts* opinion as barring all race and gender-conscious relief in the form of goals and timetables, numerically referenced relief, not only in the layoff context where there is a seniority provision, but also in the context of hiring and promotion. I want to suggest that that reading by the Justice Department of the case is simply wrong.

Prior to *Stotts*, all 11 of the circuit courts had expressly authorized the use of goals and timetables as one of the remedies available under title VII, and the Supreme Court in the *Teamsters* case had also recognized that form of relief approvingly. In *Stotts*, if the court, then, would be barring that relief, it would have had to overrule all 11 circuits. Typically when the court does that, it says so. It does not overrule 11 circuits sub silento. And there is no reason to believe that it did so here either.

Indeed, the decree at issue in *Stotts* contain goals and timetables, and the court allowed them to stand. If it was barring that kind of relief, it would have eliminated them in *Stotts*. And had it done so, would not have had to go on to the other holding in *Stotts*. But more important than my interpretation of *Stotts* is the interpretation of the courts that have reviewed the case subsequently.

The case has been reviewed now by five circuits. All five of those circuits agree with my narrow reading of the decision and disagree with the Department of Justice's reading of the decision. Thus, it is appropriate now for EEOC to follow those decisions in the form of an interpretive bulletin published to the employers and unions and citizens subject to its jurisdiction and give appropriate guidance to its field employees. It is just simply not good enough to have the general counsel write a memorandum that goes to the Commissioners.

The legal advice of the general counsel should be shared much more broadly. EEOC, after all, does have a leadership responsibility here and they should proceed with it.

I next want to move to some of the current problems in EEOC's handling of charges and lawsuits. I would like to begin by noting that probably one of the biggest problems is the sharp reduction in the number of lawsuits being filed and the number of charges in their backlog or in their inventory of charges. I won't go into those in any detail. They are set forth in my written testimony, but the real expert on those matters is Nancy Kreiter, and so I want to

defer to Nancy on the details of the great falloff in EEOC enforcement activity.

I do want to make merely this comment, though. While I don't question that Fred Alvarez or Clarence Thomas are people of good will, and the other Commissioners as well. The proof of the pudding is in the eating. You can't have all this vigorous enforcement of title VII and vigorous pursuit of systemic cases with the kind of reductions in litigation that we observed here on the statistics which are, after all, provided by them.

I would like to summarize my next points about EEOC's quarrelling with controlling case law which I want them to stop doing, by referring to something else that Commissioner Alvarez said this morning. He commented that there seemed to be a problem of communication and a problem of perception. And I think, in part, he is right. That is one of the problems. But much of the blame for that lies with the Commissioners, including for reasons that I just mentioned about Fred Alvarez, the comments that he made out in Cincinnati compared with the comments that he made this morning.

If you will look at the point blank statement, and then you look at his interpretation of it, but also by Clarence, out in the real world they are making comments and then they come before this body and say, "But I am only an individual Commissioner, and the Commissioner is a collegial body and makes collegial decisions. That is how policy is made."

Well, you can't go out and make speeches that frankly misinterpret the law, and then say, "Well, there is a problem of perception. People don't really understand." You have got to conform your comments and your statements to what the law is and to what your official policies really are, and resist the temptation to go beyond those in what can sometimes be a rather controversial and provocative statement.

Then I want to come to the question of the guidelines. The EEOC has indicated an intent to reconsider their guidelines on testing. As part of that reconsideration. They, then, want to ask some several questions. I think in part you can assess the decision to reconsider the guidelines just by taking a look at the questions. They ask them whether the holding in *Griggs* has been eroded by *Stotts*.

The *Stotts* decision was a major decision by the Supreme Court, and has provoked already scores of law review articles. Even I have written one of them. No commentator in any of the journals has ever suggested that *Stotts* erodes *Griggs* at all. To have that in mind as you start to evaluate the guidelines is—I don't mean to be pejorative in saying this; I mean to be descriptive—silly.

Whether the *Griggs* holding that practices with disprirt impact are unlawful unless shown by the employer to be job-related, it is consistent with the 14th amendment. Sure it is, and lots of courts have so held. It is just no question about that. A number of the cases have arisen under the 14th amendment standard. And the courts have uniformly so stated.

Whether employers should have the benefit of a cost defense in seeking less discriminatory procedures—in other words, if it costs a lot, we ought to let them discriminate. I think you already decided that in passing the statute. Whether the EEOC testing guidelines should be cut loose from the professional standards of the Ameri-

can Psychological Association, notwithstanding the fact that the exemption for tests in the act is only for "professionally developed ability tests."

First, it seems to me the answer is set forth in the question. The statute has decided that. But quite apart from that, the Supreme Court has considered the matter twice, both in *Griggs* and in *Albemarle Paper Company* v. *Moody*, when you have got a Supreme Court decision that construes your guidelines and expressly approves of them, why do you want to review that?

In short, if it ain't broke, don't fix it. If there is no reason, then, to think that the guidelines based on the questions here or based on just a quick review of the law, need any revision. But before I finish on the guideline point and then conclude, I just want to point out how much the guidelines make good sense.

The guidelines are based on two principles or theories. Whether you have got an employee selection device, be it a test or an educational requirement or whatever, if it doesn't exclude people protected by the act, why bother with it. On the other hand, if it does exclude a disproportionate number of people protected by the statute—that is point No. 1, principle. If it is exclusionary then you have got a concern and the principle would trigger, it says, if there is an exclusion of a disproportionate number, then point No. 2 kicks in, and it requires only that the employer must show that the test is reasonably related to the job.

In other words, it determines are you being excluded because you can't do the work? Are you being excluded because of race? Show that it tests ability to perform, and you can use it even though it excludes. Those two principles, it seems to me, have been adopted by the courts as principles of law for reasons that they make good sense. Expert psychologists and others can argue about the technicalities of how you go about determining validation. And we frequently enter into that kind of a controversy, but as to the first two basic principles which the EEOC seems to be ready to review, there shouldn't be any question about that under any circumstances.

I want to conclude, then, by making the following suggestions: EEOC ought to, one, establish a sensible set of litigation and enforcement priorities together with appropriate guidance to the field which they would publish, issue, be available to their own people and the rest of us who want to know how they are proceeding and get the commissioners out of the business of reviewing every failure of conciliation.

Two, they ought to revise their settlement guidlines in accordance with the kind of sensible suggestions I made earlier and court decisions. Three, they ought to go forward to provide an interpretation of the *Stotts* decision consistent with what the courts have said about it? And, four, the EEOC ought to terminate its unnecessary review of the testing guidelines.

[The prepared statement of William L. Robinson with attachments follow:]

PREPARED STATEMENT OF WILLIAM L. ROBINSON, DIRECTOR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND RICHARD T. SEYMOUR, DIRECTOR EMPLOYMENT DISCRIMINATION PROJECT OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW.

Mr. Chairman and Members of the Subcommittee, we appreciate the opportunity to provide testimony here today. Our testimony before this Committee will cover five main areas.

First, we will discuss the Commission's September 11, 1984 "Statement of Enforcement Policy" and its February 5, 1985 "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination". We applaud the Commission's interest in strengthening the remedies available for violations of Title VII of the Civil Rights Act of 1964,[1] but we have serious misgivings about many of the policy choices made by the Commission. See pp. 2-10 of this Statement.

Second, we will discuss the proper interpretation of this Supreme Court's decision in *Firefighters Local No. 1784 v. Stotts*, 81 L.Ed.2d 483, 104 S.Ct. 2576 (1984). The courts of appeals in six Circuits have addressed the proper interpretation of *Stotts*, and none of them have agreed with the broad position advanced by the Justice Department and by the Chairman of the EEOC, to the effect that *Stotts* outlaws all race-conscious and gender-conscious affirmative action in hiring and promotion. We understand that the Chairman will ask the full Commission to vote at some time in the future on the question whether to adopt the position of the Justice Department, notwithstanding the virtually uniform judicial rejection of such an overbroad reading of *Stotts*. It is troubling that the Commission's recommended schedule of remedies has, in the absence of such a vote, dropped the traditional remedy of affirmative-action goals and timetables. See pp. 10-20 of this Statement.

Third, we will discuss current problems in the Commission's handling of charges and lawsuits, which we expect to have a strong impact on the Commission's ability to carry out its stated intention of filing suit in all cases in which conciliation has failed and in which the Commission had found "reasonable cause" to believe that the charges of discrimination were true. See pp. 20-31 of this statement.

Fourth, we will discuss the serious errors in many of Chairman Thomas' recent statements concerning the standards of liability to be applied in cases arising under Title VII of the Civil Rights Act of 1964, and as to the Uniform Guidelines on Employee Selection Procedures. It is our position that the Chairman of the EEOC should immediately cease his misstatements of controlling caselaw under Title VII, and should recognize that both he and his agency are bound by the rule of law. The unwarranted attacks by Commissioners on the use of statistical proof and on the Uniform Guidelines have not only sown confusion in the EEOC's district offices, but are making meaningful enforcement activity impossible. See pp. 31-36 of this Statement.

A. THE COMMISSION'S STATEMENT OF ENFORCEMENT POLICY AND RECOMMENDED SCHEDULE OF REMEDIES

1. The EEOC's September 11, 1984 statement of enforcement policy

On September 11, 1984, the EEOC issued its "Statement of Enforcement Policy" stating that it intended to file suit in every case in which reasonable cause was found and conciliation had failed, and that "[o]ne finding of discrimination is no more 'worthy' of litigation than any other finding of discrimination." Statement at 2. We do not consider this goal to be possible, practical, or even desirable.

First, the Commission has informed its local offices, inconsistently with this Statement, that it will not consider for litigation any systemic charge in which "reasonable cause" has been found unless specific individual victims—presumably in addition to the charging party—are located and interviewed. It is often difficult to identify such victims on the basis of the limited information which can be obtained in an EEOC investigation; in our own enforcement cases, the identification of specific victims often requires the development of a full trial record. In many cases, such as those in which there are many more unhired minority or female applicants than there were vacancies which would have gone to minorities or women in the absence of discrimination, it is impossible to identify which specific individuals would have

[1] At the June 21, 1985 hearing held by the Subcommittee on Employment and Housing of the House Committee on Government Operations, Chairman Thomas stated that he would support an amendment to Title VII to provide for trebling back pay awards, in order to increase the monetary penalties for discrimination. The Lawyers' Committee agrees that awards of back pay have in practice been insufficient to deter some employers from discriminating, and that an upgrading of monetary relief would be appropriate.

been hired in the absence of discrimination. *Cf. Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 262, n. 182 (5th Cir., 1974):

The key is to avoid both granting a windfall to the class at the employer's expense and the unfair exclusion of claimants by defining the class on the discriminatory at the amount too narrowly. For instance in this case, rationally to presume that employee #242 would have been promoted in three years to rank ordinarily [illegible] employee #262 is no speculative an unlikely to penalize employee #262.

For these reasons, the courts have preferred a "classwide" approach under which all members of minority groups or women in the groups affected by the practice are presumptively entitled to individual relief. By insisting on the identification of individual victims at the start of the process, a large number of litigation cases will never be presented for litigation approval.

Second, it is entirely untrue, as a matter of common sense, that every finding of "reasonable cause" is as worthy of litigation as every other finding of "reasonable cause". One finding may affect a thousand persons, and involve enormous losses of earnings for women or minorities. Another may involve nothing more than the legality of a day's suspension resulting in eight hours' loss of wages. Any isolated claims of unlawful discharge will ordinarily be extremely important to the person discharged, but, apart from patterns of discriminatory discharge, sexual harassment cases and age discrimination cases,[2] the law enforcement value and deterrent effect of litigating that one person's discharge is ordinarily far less than that of litigating hiring and promotion issues which affect a substantial number of persons. Charges of discriminatory discharge are a large percentage of all charges received: in FY 1980, the EEOC received 88,554 charges of discrimination based on race or color. Excluding the 721 sexual harassment charges combined with allegations of racial discrimination, there were 20,991 discharge claims based on race and color. This represents more than a third of all charges of discrimination based on race or color. The EEOC could readily exhaust all of its litigation resources on handling isolated discharge claims in which cause is found and conciliation fails, without bringing this nation one step closer to true equality of opportunity.

Third, the EEOC simply does not have the capability of litigating every case in which reasonable cause is found and conciliation fails. To go from a couple of hundred cases a year to a couple of thousand would risk the type of disaster exemplified by China's "Great Leap Forward". As we repeatedly urged during the Carter Administration, the EEOC should be filing far more cases than it presently files. Our urgings to the Carter Administration can be increased 1000% to this Administration, in light of the enormous drop in litigation activity in this Administration. What the EEOC needs is not an immediate tenfold increase in case filings without any exercise of judgment about the impact of the cases it will file, but a sensible set of priorities as to the scope, probable impact, and number of the cases it will file.

Fourth, we fear that the EEOC will look to the attorneys in the district and regional offices to be handling individual cases, and will look to the attorneys in the systemic unit to be the only ones handling systemic cases. This would not be sensible. Many systemic cases involve local plants or facilities, and are best handled on a local basis. Every EEOC attorney, whether in a local office or Headquarters, should be looking for worthwhile systemic cases to bring.

2. The EEOC's February 5, 1985 policy statement on remedies and relief for individual cases of unlawful discrimination

On February 5, 1985, the EEOC issued its Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination. Some parts of the statement are quite well taken. However, we fear that the statement, taken as a whole, will hamper the Commission's efforts to obtain compliance and will sow intense racial and sexual dissension in the workplace.

First, the Policy Statement is ostensibly to be applied in "individual cases". The problem is that the Chairman considers systemic cases to be "individual" cases for purposes of this Statement. At an EEO Law Seminar in Pittsburgh on May 2, 1985, Chairman Thomas criticized his "predecessors" for choosing to:

". . . concentrate on prospective relief in the form of numerical goals and timetables, rather than full relief for the party actually filing the charge. As I noted earlier, the emphasis was not on securing full relief to charging parties, but getting rid

[2] Because of the nature of these claims, many of the most important sexual harassment cases and age discrimination cases will involve discharge. There are also some extremely important instances of patterns of discriminatory discharges involving substantial numbers of minorities or women, which it is extremely important for the Commission to challenge.

of cases. However, there was an emphasis on obtaining broad remedies for a *theoretical* group which had *not* filed charges.

"I find it ironic that anyone would put a policy in place which provided less for those who were *actually* hurt than for those who *may* have been hurt as a result of some historical events. To correct this imbalance in priorities, the Commission approved a policy statement which sets the remedies which our staff must seek for charging parties. . . ."

Speech at 10–11. If the EEOC acts in accordance with this understanding of policy, the EEOC will *contest itself*, in a case involving a discriminatory test or other practice affecting a hundred blacks or women, to seeking relief for the one person who filed a charge, and leaving everyone else unremedied.

If this is intended to be the policy of the EEOC, it will achieve little relief in its systemic cases and the expense and burden to which the EEOC will have gone in litigating the cases will largely have gone for naught.

Second, the Policy Statement requires that a victim of discrimination be given an immediate, unconditional offer of placement in the position denied, even if this means the "bumping" of an innocent white employee or male employee. This domino step is not limited to cases in which the "bumped" employee was the beneficiary of the unlawful discrimination; the EEOC intends to apply this remedy without regard to whether the "bumped" employee had been the beneficiary of discrimination. We doubt whether any employer would ever agree to such a step, and we doubt whether any Court would ever order such a step.[3] If such relief were ever put into effect, it would predictably result in enormous dissension in the workplace, pitting white employees against black employees, and male employees against female employees.

It is difficult to imagine the EEOC's rationale for making the tried, effective, and—most importantly—widely accepted remedy of goals and timetables for filling future vacancies, in favor of an unrealistic form of relief benefitting few direct victims of discrimination and causing so much practical difficulty. This mistaken trade-off is an excellent illustration of the present Commission's insistence upon "fix" things which are not broken.

Third, the Policy Statement indicates that "full relief", as the Statement defines it, must be obtained in every case in which a finding of "reasonable cause" is made. EEOC staff are allowed to accept less than the Policy Statement's full panoply of remedies only if the compromise "address fully the remedial concepts described in this policy." The Policy Statement concludes:

Conciliation should be pursued with the goal of obtaining substantially complete relief through the conciliation process. Any divergence from this goal must be justified by the relevant facts and the law."

While there is some ambiguity in the Policy Statement, taken as a whole it suggests too much rigidity to give employers an incentive to conciliate a charge or settle a case, and it does not allow Commission staff to moderate settlement demands in light of the relative chances of success if the matter were to be litigated to trial.

Fourth, the Policy Statement does not mention one of the standard forms of relief in fair employment cases: requirements that the employer keep records sufficient to demonstrate compliance, that the employer report summary information to the EEOC and to the Court, and that the employer make the full records available for inspection on reasonable notice. In our experience, such relief is essential in most cases involving patterns of discriminatory activity.

Fifth, the Chairman's remarks quoted above indicate that a number of cases involving class-type patterns of discriminatory activity will nonetheless be handled under this Policy Statement.

We support the idea of posting notices of violations found and of the remedies provided; a number of the Decrees we have obtained include such relief. We support the idea of removing victims of discrimination from the supervision of individual perpetrators of subjective discrimination, where such supervisors are identified. We support the expungement of discriminatory references from personnel files. We support the backpay provisions of the Policy Statement. We caution that the Commis-

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[3] Under the rules of some civil service systems, and under the terms of some collective bargaining agreements, an employee improperly awarded a position is ordinarily removed from the position until a proper selection can be made. A few courts have ordered that such provisions be exercised, but such an approach is rare, even when such special circumstances are present. There is no authority for the kind of automatic "fire the nearest white male" approach being advocated by the EEOC.

sion should not reject reasonable compromises because one of these elements is lacking; the reasonableness of the settlement package as a whole should be the guide.

B. THE EEOC SHOULD EXPRESSLY REJECT THE JUSTICE DEPARTMENT'S OVERBROAD READING OF THE STOTTS CASE

Recent public statements of Chairman Thomas indicate that he plans to ask the full Commission to vote on a proposal to adopt the position of the Justice Department on the proper interpretation of *Stotts*, notwithstanding the virtually unanimous judicial rejection of the Justice Department's overbroad reading of this case. Because the public importance of this issue, we have prepared a full discussion of the question for the record of this hearing. The position of the Justice Department, stripped to essentials, is that regardless of the facts of any particular case, regardless of the presence or absence of prior discrimination against minorities or women as a group, and regardless of the practical requirements of achieving affirmative relief and preventing further discrimination, neither Title VII nor the Constitution permits the Commission or any Court to order, or permit a public employer voluntarily to adopt, any race-conscious or gender-conscious relief which is not limited to identifiable, proven individual victims of past discrimination.

The currently evolved position of the Justice Department has become even more extreme than the above formulation would suggest. The Department is now distinguishing between victims who are "identifiable" and known persons it admits are actual victims but who it contends are still not "identifiable". For example, suppose an employer gave an unlawful test to 1,000 job applicants, half of whom were white and half of whom were black. If the employer were filling 100 jobs, and all 100 jobs went to whites because of the test results, the Justice department would agree that the denial of roughly 50 jobs to blacks was discriminatory, and that all of the 500 blacks denied fair consideration for those jobs were actual victims of discrimination. However, the Justice Department would oppose any remedy which would result in 50 jobs going to these actual victims, on the ground that an "actual victim" is not an "identifiable victim". There can only be an "identifiable victim", the Justice Department maintains, if a non-discriminatory selection procedure is developed, all 500 black actual victims are evaluated under the new procedure, and if the new procedure shows which 50 blacks would have gotten the jobs if the new procedure had been in use then. Thus, the employer is allowed to get away scot-free with its all-white hiring, and the practical result of the Justice Department's bizarre theory is to encourage discrimination.

In May 1981, the City announced that projected budget deficits would require a reduction of nonessential personnel employed by the City. Layoffs were to be based on the "last hired, first fired" rule incorporated in the City's memorandum with the union. At the plaintiffs' request, however, the district court issued a temporary restraining order forbidding the layoff of any black employee. The district court subsequently ruled that the City's seniority system was not bona fide within the meaning of Section 703(h), 42 U.S.C. § 2000e–2(h),* and entered an order prohibiting the City from applying the "last hired, first fired" rule so as to decrease the percentage of blacks in certain job classifications within the fire department. 104 S. Ct. at 2582.

1. The Stotts Decision

The Supreme Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), arose out of a class action filed in 1977 by black employees of the Memphis, Tennessee, fire department. The complaint alleged a pattern or practice of racial discrimination on the part of the fire department and city officials, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., and 42 U.S.C. §§ 1981 and 1983. The case was settled by consent decree which required the City to promote 12 named individuals and to provide back pay to 81 others. The decree also established a long-term hiring goal for each job classification in the fire department and interim hiring and promotion percentage goals. 104 S. Ct. at 2581.

The importance of a proper resolution of the *Stotts* issue cannot easily be overstated. The progress which has been made in this country in righting the wrongs of slavery and segregation has depended on the power and willingness of the Commission and of the Federal courts to provide effective remedies whenever a violation of

* Section 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e–2(h).

rights has been shown. Because members of minority groups have been able to obtain effective relief from these sources, they have been willing to entrust to the courts the orderly resolution of grievances of near-shattering importance. The courts, in turn, have relied on past policy statements of the EEOC supporting the use of goals and timetables. Only the most compelling of reasons should result in the elimination of remedies of proven effectiveness, no matter how great the need for such remedies in particular cases. We submit that, on examination, the bases for the Justice Department's attempt to obliterate relief, the EEOC's policies, and even the EEOC to repeat the Justice Department's position.

On appeal, the court of appeals rejected the district court's conclusion that the City's seniority system was bona fide. *Stotts v. Memphis Fire Department*, 679 F.2d 541, 551 n.8 (6th Cir. 1982), but affirmed the order. The court reasoned that the consent decree itself had been properly approved by the district court, id. at 551, and that the order regarding layoffs was a necessary to enforce the terms of that valid decree, id. at 561. Alternatively, the court held that the district court's order was a valid modification of the decree, based on new and unforeseen circumstances. Id. at 562-63.

The Supreme Court reversed.[8] According to the Court, the central issue was "whether the District Court exceeded its powers in ordering that, regardless of [white employees to be laid off, whose jobs otherwise would be protected by seniority, would have called for the layoff of black employees with less seniority." 104 S. Ct. at 2595 (footnotes omitted). In resolving that issue, the Supreme Court rejected the reasoning of the court of appeals that the layoff order was simply designed to enforce the terms of a valid consent decree. While the parties may have intended the underlying decree establishing the hiring and promotion goals for the City to limit the consent decree, properly construed, did not contemplate modification of the City's seniority-based layoff policy as a means of complying with those goals. Id.

The Court analyzed the proposition that layoffs could be characterized as bona fide the layoff order as a modification of the consent decree. The Court noted that Section 706(h) of Title VII, 42 U.S.C. § 2000e-5(h), immunizes bona fide seniority systems from challenge under Title VII, absent proof of intentional discrimination, and that the court of appeals had found the City's "last hired, first fired" policy to be part of a bona fide seniority system. 104 S. Ct. at 2597. The Court reiterated the holdings of *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), that seniority under an existing seniority system may be awarded to identifiable individual victims of discrimination (even though such remedial seniority would give such victims preferential rights over employees who have in fact been employed in the relevant position for a longer period) but such relief, when the provisions of Section 706(h) are applicable, may be awarded only to such victims. 104 S. Ct. at 2597. Because the blacks whose jobs were protected under the district court's layoff order were not specifically proven victims of discrimination, the Court concluded that the layoff order imposed relief "that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed" but had failed to show that the specific incumbents had been victimized by that discrimination. Id. On that basis, the Court held that the layoff order at issue was unlawful.

Having held that Section 706(h) (immunizing bona fide seniority systems) required reversal, the Court went on to note that this result "is consistent with the policy behind § 706(g) of Title VII, which affects the remedies available in Title VII litigation." Id. at 2598-99. That policy, the Court stated, "is to provide make-whole relief only to those who have been actual victims of illegal discrimination." Id. at 2599. The Court did not suggest that the victim-specific limitation that Section 706(g) places on "make-whole" relief prevents courts from granting any relief that might benefit persons not identifiable as individuals victims of discrimination. Indeed, the language of the Court concerning the policy of Section 706(g) is expressly limited to "make-whole" relief.

The *Stotts* decision deals with make-whole relief and does not reach the issue of class-conscious relief which is the remedy challenged by the Justice Department. Consequently, *Stotts* cannot be stretched to bar class-conscious affirmative relief, as the Justice Department claims it does, especially since such relief has been widely recognized as the only effective method of remedying the present and future effects

[8] Justice White wrote the Opinion of the Court; Justice O'Connor filed a concurring opinion and Justice Stevens filed an opinion concurring on the judgment. Justice Blackmun wrote a dissent, in which Justice Brennan and Justice Marshall joined.

of past discrimination. Respect for precedent should compel the Commission to reject the Justice Department's argument.

2. Stotts Does Not Bar Race- and Gender-Conscious Relief

No majority of the Supreme Court has suggested, in *Stotts* or elsewhere, that affirmative race- and gender-conscious remedies are prohibited.

On the contrary, the majority opinion in *Stotts* is clearly inconsistent with the interpretation the Justice Department wants to force upon it. The underlying consent decree in *Stotts* imposed percentage goals in the City, and the court of appeals, in analyzing the lawfulness of the layoff order, was considering its effect on the lawfulness of the underlying decree, which it upheld. *See Stotts*, supra, 678 F.2d at 553-56. The Supreme Court, however, nowhere suggested that the goals imposed by the underlying decree were unlawful, a view that plainly would have conflicted with the Court's interpretation of the decree and its discussion of Section 706(g) and the limits on "make-whole" relief—in effect, the body of the opinion—and thus an opinion of the Supreme Court should not be so construed.[9]

The Justice Department's interpretation of *Stotts*, moreover, rests on the highly questionable set of assumptions: That the United States Supreme Court would decide an important and controversial issue without making it explicit that it is doing so; that the Court would overrule an immense body of accepted decisional law, again without making its ruling explicit,[10] and that the Court would reach such a sweeping decision without discussing the numerous competing public policies implicated in this issue and in the array of precedential decisions.

that is what the Court did; it has never done so before in any other case of which we are aware.

Moreover, two of the six justices who agreed with the result in *Stotts* expressly stated that the race-conscious relief affected by the layoff order could have been sustained under appropriate circumstances. Justice Stevens took the view that the layoff order would have been permissible if it had been an order enforcing the underlying consent decree, rather than a modification of the decree. 104 S. Ct. at 2597 (Stevens, J., concurring).[9] Justice O'Connor stated that the order requiring maintenance of a percentage of blacks in various job classifications within the Memphis Fire Department would have been justified if the plaintiffs had "presented a plausible case of discriminatory animus in the adoption or application of the seniority system." Id. at 2592 (O'Connor, J., concurring). The opinion of the Court in *Stotts*, in which Justice O'Connor joined, simply cannot reasonably be read to create an absolute ban against affirmative race- and gender-conscious relief.

In short, the use to which the Justice Department wishes to put *Stotts* is wrong legally and factually and—as the above assumptions reveal—violates the tenets of judicial interpretation and of common sense.

3. The Justice Department ignores the well-established distinction between make-whole relief and affirmative relief under title vii and the fact that the Court in Stotts was addressing the requirements of make-whole relief

The Justice Department's reading of *Stotts* ignores the distinction, commonly accepted in the law of employment discrimination, between retrospective, victim-specific "make-whole" relief and prospective, race- and gender-conscious remedies. At bottom, the Justice Department's argument must be, as noted above, that the Supreme Court's discussion of the policies limiting awards of "make-whole" relief was

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[9] The language of the majority opinion explicitly underwrote the Justice Department's interpretation. The Court expressly recognized that in certain cases, a district court may award relief benefitting those who are not proven victims of discrimination:

"Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent *either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy if necessary to make whole a proven victim of discrimination.*" 104 S. Ct. at 2587 n.9 (emphasis added).

[10] *See Deveraux v. Geary*, 596 F. Supp. 1481, 1488 (D. Mass. 1984) ("Had the Court meant to rewrite Title VII law to mean that all affirmative action programs are improper absent a finding of actual past discrimination, it would have said so here.").

[9] See cases cited in note 12, infra. It defies logic and common sense to suggest that

[9] The majority in *Stotts* did not reject this view. The opinion of Justice White took issue with Justice Stevens' suggestion that Title VII is irrelevant to a case involving the administration of a consent decree, not with his statement that the relief involved would have been permissible if contemplated by the consent decree. See 104 S. Ct. at 2597 n.8. Indeed, Justice White's rebuttal of Justice Stevens' position is painstakingly limited to the issues raised by the district court's modification of the consent decree over the objection of one of the parties. The Court expressly withheld judgment on the question whether the race-conscious practice at issue would have been lawful if the defendant employer had adopted it voluntarily. Id. at 2590.

designed to overrule an overwhelming body of case law wholly unrelated to "make-whole" relief and, what is more, that the Supreme Court did so without even referring to that case law or to the policies underlying it.

Section 706(g) of Title VII provides, in pertinent part, as follows:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of [§ 704(a)] of this title." 42 U.S.C. § 2000e-5(g).

In determining what relief is "appropriate" under Section 706(g), it has long been recognized that "the scope of a district court's remedial powers . . . is determined by the purposes of the Act." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 364 (1977). It is equally well established that Title VII is propelled by dual purposes: "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429–30 (1971), and "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). *See Teamsters*, *supra*, 431 U.S. at 364; *Stotts*, *supra*, 104 S. Ct. at 2588 (O'Connor, J., concurring).

Not surprisingly, these dual policies have prompted courts to fashion a variety of remedies for Title VII violations, tailored to the circumstances of particular cases. Thus, the "make-whole" policy of Title VII requires that individual victims of discrimination "be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764 (1976) (quoting Section-by-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972) (hereinafter "*Analysis of H.R. 1746*"), *reprinted in* Subcomm. on Labor of the Senate Committee on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972*, at 1844, 1849 (1972) (hereinafter "*1972 Leg. Hist.*"). Such "make-whole" relief may include back pay or an award of constructive seniority with its attendant competitive advantages. *Berkman* v. *City of New York*, 705 F.2d 584, 596 (2d Cir. 1983). On the other hand, and quite apart from the "make-whole" policy of Title VII, the Courts of Appeals have unanimously recognized that in some cases, the need to eradicate the effects of widespread discrimination calls for prospective, race- or gender-conscious affirmative relief.[10]

In the wake of *Stotts*, every court which has considered the issue has rejected the expansive interpretation urged by the Justice Department. *Donovan* v. *County* ——— F.2d ———, 38 FEP Cases 28 (1st Cir., June 24, 1985); *Turner* v. *Orr*, 759 F.2d 817, 823–26 (11th Cir., 1985); *EEOC* v. *Local 638 . . . Local 28 of the Sheetmetal Workers' Int'l Ass'n*, 753 F.2d 1172, 1185–86 (2d Cir. 1985); *Vanguards of Cleveland* v. *City of Cleveland*, 753 F.2d 479, 485–86 (6th Cir., 1985), *rehearing en banc denied*; *Van Aken* v.

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[10] *See, e.g., Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1027–1028 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Equal Opportunity Commission Local 638 . . . Local 28 of the Sheet Metal Workers' Int'l Ass'n*, No. 83-7238, slip op. at 37 (2nd Cir. Jan. 16, 1985); *Ass'n Against Discrimination in Employment, Inc.* v. *City of Bridgeport*, 647 F.2d 256, 278–81 (2d Cir.), *cert. denied*, 455 U.S. 988 (1981); *Rios* v. *Enterprise Ass'n, Steamfitters Local 638*, 501 F.2d 622, 629 (2d Cir. 1974); *Kromnick* v. *School District of Philadelphia*, 739 F.2d 894, 909–10 (3d Cir. 1984); *EEOC* v. *American Tel. & Tel. Co.*, 556 F.2d 167, 174–177 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *Chisholm* v. *United States Postal Service*, T. 665 F.2d 482, 499 (4th cir. 1981); *United States* v. *City of Alexandria*, 614 F.2d 1358, 1363–1366 (5th Cir. 1980); *United States* v. *I.B.E.W., Local No. 38*, 428 F.2d 144, 151 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *United States* v. *City of Chicago*, 663 F.2d 1354, 1362 (7th Cir. 1981) (en banc); *Firefighters Institute* v. *City of St. Louis, Missouri*, 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981); *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 553–554 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *United States* v. *Lee Way Motor Freight, Inc.* 625 F.2d 918, 943–44 (10th Cir. 1979); *Sagar* v. *Smith*, 738 F.2d 1249, 1253–54 (D.C. Cir. 1984); *Thompson* v. *Sawyer*, 678 F.2d 257, 294 (D.C. 1982); *Palmer* v. *District Board of Trustees*, 36 FEP Cases (BNA) 778, (11th Cir. 1984).

Young, 750 F.2d 43, 45 (6th Cir., 1984); *Wygant v. Jackson Board of Education*, 746 F.2d 1152, 1157–58, (6th Cir., 1984); *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 900 (3rd Cir. 1984); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1362, 1360 n. 5 (9th Cir. 1985) (dictum); *Massachusetts Association of Afro-American Police v. Boston Police Dept.*, —— F. Supp. ——, 37 FEP Cases 1369 (D. Mass., 1985); *U.S. v. City of Buffalo*, —— F. Supp. ——, 37 FEP Cases 1722 (W.D.N.Y., June 5, 1985); *In re Birmingham Reverse Discrimination Employment Litigation*, 37 FEP Cases 1, 8 (N.D.Ala., 1985).

The purpose of race- and gender-conscious relief is not to benefit the individual victims of prior discrimination, but to remedy the discrimination suffered by the class of persons.[11] Thus, the last sentence of Section 706(g), which forbids courts to order the "hiring, reinstatement, or promotion of an individual as an employee, . . . if such *individual* was . . . refused employment or advancement or was suspended or discharged for any reason other than discrimination" (emphasis added), has no bearing on race- or gender-conscious relief of the type at issue here. That language merely prohibits a court from ordering that a particular individual be hired, promoted or reinstated if an employer has refused to hire or promote him, or has discharged him, for nondiscriminatory reasons. *See EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 176 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). Affirmative race- and gender-conscious remedies do not require the hiring, promotion or reinstatement of *any particular* individual. They do not create a right to a particular job on behalf of any *particular* individual. Rather, they are designed to overcome and prevent discrimination.

As Justice Blackmun observed in *Stotts*, in connection with race-conscious relief:[12]

"The purpose of such relief is not to make whole any particular individual, but rather to remedy the present class-wide effects of past discrimination or to prevent similar discrimination in the future. Because the discrimination sought to be eliminated by race-conscious relief is the class-wide effects of past discrimination, rather than discrimination against identified members of the class, such relief is provided to the class as a whole rather than to its individual members. . . . The distinguishing feature of race-conscious relief is that no individual member of the disadvantaged class has a claim to it, and individual beneficiaries of the relief need not show that they were themselves victims of the discrimination for which the relief was granted." 104 S. Ct. at 2606 (Blackmun, J., dissenting); *see also Berkman v. City of New York*, 705 F.2d 584, 595–96 (2d Cir. 1983).

If Congress had meant, in Section 706(g), to forbid preferential treatment of blacks, Hispanics or females as a class to eliminate the effects of prior discrimination, it could have said so. But it did not. Indeed, when the opportunity to enact such a provision presented itself, Congress flatly rejected it. During the Senate's consideration of the Equal Employment Opportunity Act of 1972, Senator Ervin proposed an amendment providing that no agency or officer of the Federal government shall require an employer to hire persons of a particular race "in order that racial or variable numbers, proportions, percentages, quotas, goals or ranges." 118 Cong. Rec. 1662 (1972), *1972 Leg. Hist.* at 1069. Senators Javits and Williams spoke against the Ervin amendment, arguing that it would deprive courts of power to remedy discrimination under Title VII. *Id.* at 1675, *1972 Leg. Hist.* at 1071 (remarks of Sen. Javits); *Id.* at 1676, *1972 Leg. Hist.* at 1072 (remarks of Sen. Williams). The amendment was defeated by a vote of 44 to 22. *Id.*, *1972 Leg. Hist.* at 1074.[13]

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[11] In a law enforcement context, there is an additional consideration. The operational needs of the law enforcement agency constitute an additional and compelling justification for affirmative race-conscious relief. The courts have recognized that effective crime prevention and detection depend on public support and cooperation and that such support will not exist if the black community perceives the law enforcement agency "as part of the white establishment with little interest in their problems." *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695–96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *see United States v. City of Chicago*, 549 F.2d 1264, 1284 (7th Cir. 1961) (en banc); *Talbert v. City of of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982).

[12] Justice Blackmun dissented from the majority's treatment of the merits issue in *Stotts* and from its treatment of the standards for granting a preliminary injunction. He also took issue with the Court's discussion of §706(g). Justice Blackmun, however, did not construe the majority opinion as barring affirmative race-conscious relief and thus had no occasion to dissent from any such proposition. *See* 104 S. Ct. at 2610 (Blackmun, J., dissenting).

[13] Congress' rejection of the Ervin amendment must be understood as an endorsement of then-existing case law authorizing race-conscious relief benefiting others than individual identifiable victims of discrimination. Whatever may be said about Congress' intent to codify existing Title VII case law as a general matter, *see Stotts*, *supra*, 104 S. Ct. at 2590 n.15, Congress plainly

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The distinction between race-conscious relief and "make-whole" relief, and the distinction between their policy underpinnings, are matters of hornbook law. See B. Schlei & P. Grossman, *Employment Discrimination Law* at 1296–1412 (2d ed. 1983). The Supreme Court has recognized the distinction. See, e.g., *Teamsters*, *supra*, 431 U.S. at 361. In *Stotts*, therefore, the majority explicitly confirmed its language pertaining to the victim-specific limitations of Section 706(g) to "make-whole" relief. *See* 104 S. Ct. at 2585. Any attempt to extend the Supreme Court's pronouncements on "make-whole" relief to the area of race- and gender-conscious remedies designed to eradicate the effects of past discrimination is simply wrong. That is not what the Supreme Court did and, we must assume, that is not what the Supreme Court intended to do.

4. The Justice Department's position would disastrously undercut critical policy underlying title VII and principles established by the Supreme Court

Any argument that Section 706(g) forbids race- and gender-conscious relief, apart from being unsupported by the language of that section or by precedent, would, if accepted, eviscerate enforcement of the critical objective of title VII, "to eliminate, so far as possible, the last vestiges" of discrimination. *Albemarle Paper Co.*, *supra*, 422 U.S. at 417–18.

The "last vestiges" of discriminatory practices could not be eradicated if defendants found guilty of discrimination were required to hire or promote only those blacks, Hispanics and females who can prove that, as individuals, they are identifiable, actual victims of discrimination. Especially in a hiring context, such a showing is probably impossible as a practical matter, and such a limitation on the remedial powers of the courts would simply ignore the realities of employment discrimination cases.

Most such cases are not limited to findings of individual, discrete wrongs against a few identifiable black, Hispanic or female victims, which would be remedied by making such victims whole. In the real world of employment practices, there are cases involving long-standing and blatant discrimination against all blacks or all Hispanics or all females.[14] The only effective remedy in such cases is one benefiting blacks, Hispanics or females as a class. *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 660 (2d Cir. 1971). Indeed, limiting relief to identifiable, individual victims of discrimination would permit an employer bent on maintaining an all-white, all-male work force to succeed in its goal.

Where there has been blatant and widely known discrimination for a long period, as is true in many cases, it may be impossible to identify specific individuals who can prove they could have applied and received employment or promotion with the defendant if not for its policy of discrimination. *See United States v. Louisiana*, 225 F. Supp. 353, 397 (E.D. La. 1963), *aff'd*, 380 U.S. 145 (1965).[15]

Thus, acceptance of the Justice Department's position may make it impossible to award meaningful relief in fair employment cases.

5. Affirmative race- and gender-conscious relief does not violate the constitution

The Supreme Court's treatment of race-conscious affirmative action in other contexts underscores the problems raised by the government's arguments here. The Court has steadfastly held that race-conscious action by public entities are not only a constitutional but a most appropriate means of remedying the effects of past discrimination. *E.g.*, *Fullilove* v. *Klutznick*, 448 U.S. 448, 482 (1980); *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 289 (1978) (opinion of Powell, J.); *id.* at 355–379 (opinion of Brennan, White, Marshall and Blackmun, JJ.); *United Jewish Organizations of Williamsburgh* v. *Carey*, 430 U.S. 144, 166–68 (1977); *McDonald* v. *Barresi*, 402 U.S. 39, 41 (1971); *Swann* v. *Charlotte-Mecklenburg Board of Education*,

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intended to continue in force the case law authorizing such race-conscious relief in appropriate circumstances. During the debate on the Rivlin amendment, Senator Rudy had printed in the Congressional Record two decisions granting and upholding such relief, 118 Cong. Rec. 1685–76 (1972), *1972 Leg. Hist.* at 1048–70. Nevertheless, the Senate rejected Senator Rivlin's effort to change the law.

[14] As the Fifth Circuit has recognized, "[r]acial discrimination is by definition class discrimination. . . ." *Ostio* v. *Crown Zellerbach Corp.*, 598 F.2d 885, 889 (5th Cir. 1980).

[15] Similarly, where an employer uses a discriminatory hiring procedure, it is frequently impossible to determine which of the blacks or females who have been denied jobs by virtue of that procedure would have been hired or promoted had a nondiscriminatory procedure been in place. In such cases, only class-based relief can ensure eradication of the effects of discrimination. *See Bailey Branch, NAACP* v. *Seibels*, 13 F.P.D. (CCH) ¶ 11,394, 14 FEP Cases 679 (N.D. Ala. 1977), *aff'd in part and rev'd in part*, 616 F.2d 812 (5th Cir.), *cert. denied sub nom. Personnel Board of Jefferson County* v. *United States*, 449 U.S. 1061 (1980).

402 U.S. 1, 18-21 (1971); *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969). Yet to construe the Court as holding in *Steele* that Congress somehow intended to constrain the remedial power of the courts within limits not required by the Constitution would fly in the face of the oft-repeated policy underlying Title VII remedies: "to make possible the 'fullest[ing] [of] the most complete relief possible'." *Albemarle Paper Co.*, *supra*, 422 U.S. at 421 (*quoting Analysis of H.R. 1746*, 118 Cong. Rec. at 7168, *1972 Leg. Hist.* at 1848); *see United States v. City of Chicago*, 549 F.2d 415, 436-37 (7th Cir. 1977); *Lorance v. Dunlop*, 98 F.R.D. 60, 94 (D.D.C. 1981).

C. CURRENT PROBLEMS IN THE EEOC'S HANDLING OF CHARGES AND LAWSUITS

The materials provided by the EEOC to the Subcommittee on Employment and Housing of the House Committee on Government Operations make clear that the EEOC filed 363 lawsuits in Fiscal Year 1983, the last year in which enforcement decisions by the Carter Administration formed the bulk of the statistics. Of these lawsuits, only 229 were Title VII cases. We and other civil rights groups had repeatedly criticized the EEOC under the Carter Administration for bringing too few cases. By the standards of this Administration, however, the EEOC's performance at that time was exemplary. In FY 1984, the last year for which full statistics are available, the EEOC filed only 222 cases, a 39% decline from the 364 cases filed three years earlier. In FY 1984, the EEOC filed only 139 Title VII cases, a 43% decline from the 229 Title VII cases filed three years earlier.

The figures for the first two quarters of FY 1985 show no improvement over FY 1984. Although half of FY 1985 is reflected in these figures, the rates of filings are less than half of the FY 1983 filings.

Figures compiled by Women Employed in Chicago—one of the best private-sector sources of information on the performance of the EEOC—show the following:

(a) the EEOC estimates it will have 65,474 unresolved charges of discrimination by the end of FY 1986 [1985?], an increase of 96% since 1982.

(b) the EEOC reports that it assisted 25,878 persons in FY 1984, an enormous decline from the 64,581 assisted in FY 1983.

It is difficult to understand how the agency can sharply increase the number of lawsuits it can file, and can handle successfully, if it cannot come close to matching its own performance two and three years ago. Moreover, the squandering of the agency's resources in needlessly questioning established legal principles, as described below, and the confusion such efforts have sown in local offices, have added enormously to the difficulty of the EEOC's meeting its announced goals.

Chairman Thomas has made a number of recent statements concerning the standards of liability to be applied in cases arising under Title VII of the Civil Rights Act of 1964, and as to the Uniform Guidelines on Employee Selection Procedures.[14] It is our position that the Chairman of the EEOC should immediately cease his misstatements of controlling caselaw under Title VII, and should recognize the both he and his agency are bound by the rule of law. Corrective statements should be sent to the field offices and regional offices by the EEOC, in order to dispel the confusion created by the Chairman.

D. THE EEOC SHOULD STOP QUARRELLING WITH CONTROLLING CASELAW, SHOULD CEASE EFFORTS TO CHANGE THE UNIFORM GUIDELINES IN A MANNER INCONSISTENT WITH CONTROLLING CASELAW, AND SHOULD CONCENTRATE ON ENFORCING THE LAW

Under Chairman Thomas, the EEOC seems to be contemplating wholesale departure from universally accepted, controlling caselaw interpreting Title VII and its requirements. For example:

(a) The EEOC's "outline of Issues for the UGESP [Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1 *et seq.*] Review" expressly questions Chief Justice Burger's decision for a unanimous Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), holding that a test, educational requirement, or other objective practice which disqualifies a disproportionately large number of blacks [or members of other minority groups, or women] must be shown by the employer to be job related, or else the requirement will be held to be in violation of Title VII. The EEOC's Outline asks:

Whether the holding in *Griggs* has "been eroded by *Watts*?"

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[14] The Uniform Guidelines are the joint effort of the EEOC, the Department of Justice, the Office of Personnel Management, the Department of Labor, and the Department of the Treasury. They are set forth at 29 C.F.R. § 1607.1 (1980).

Whether the *Griggs* holding that practices with disparate impact are unlawful unless shown by the employer to be job related is "consistent" with the 14th Amendment?

Whether employers should have the benefit of a "cost defense" in thinking how discriminatory procedures?

Whether the EEOC's testing guidelines should be cut loose from the professional standards of the American Psychological Association, notwithstanding the fact that the exemption for tests in §703(h) of the statute, 42 U.S.C. §2000e-2(h), is only for "professionally developed ability tests". These questions indicate an unacceptable willingness to tinker with established law.[17]

(b) In November 1984, Chairman Thomas stated that "one of the major moves in any new proposals [on the Uniform Guidelines] will be to accept the input the American Psychological Association has had in issuing the earlier regulations."[18] Again, this ignores the unanimous decision of the Supreme Court in *Albemarle Paper*.

(c) Chairman Thomas has stated that he favored the abandonment of the traditional remedy of goals and timetables, for the curious reason that he considered them "difficult to monitor".[19] In point of fact, goals and timetables have been dropped from the recommended schedule of remedies in February 1966.

(d) Chairman Thomas has stated that the EEOC has retained to heavily on statistical proof, and that he wants the agency to place much less reliance on statistical proof in the future.[20] We are informed that, at some local offices of the EEOC, they believe they are no longer allowed to rely on statistical proof in determining whether there is reasonable cause to believe a charge of discrimination is true. In addition, there must be some individual who has personal knowledge of the employer's discriminatory motivation, or the charging party must be able to list all victims of the practice he or she is complaining of, or some other such requirement. While these offices may misunderstand the Chairman's complaints about statistical proof, such confusion is to be expected when the lead official of the agency denounces universally accepted forms of proof and provides little or no guidance beyond the denunciation.

(e) Chairman Thomas has stated that *Griggs* v. *Duke Power Co.* "has been overextended and over-applied", because it has been applied to positions above the level of common laborer.[21] However, the *Griggs* case itself applied to positions such as Control Operator and Pump Operator at the Power Station, Machinist, Electrician-Welder, Lab and Test Technician, Superintendent, Plant Engineer, and so forth. See the decision of the district court, 292 F.Supp. 243, 245 (M.D.N.C., 1968).

(f) Commissioner Webb has also criticized "the current guidelines" reliance on statistics.[22]

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[17] The Supreme Court has held that the Guidelines are "entitled to great deference" precisely because they are closely tied to the APA standards. In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975), the Court stated:

> These Guidelines draw upon and make reference to professional standards of test validation established by the American Psychological Association. The EEOC Guidelines are not administrative "regulations" promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute "[t]he administrative interpretation of the Act by the enforcing agency," and consequently they are "entitled to great deference." . . .

(Footnote omitted). The Court continued: The message of these Guidelines is the same as that of the Griggs case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." . . .

[18] Daily Labor Reporter, November 15, 1984, p. A-8.

[19] Id. at p. A-7. As our December 14, 1984 testimony before this Subcommittee pointed out, the abandonment of goals and timetables, and the insistence that no relief be awarded anyone who is not individually proven to be a victim of discrimination, ignores the essential fact that discriminatory employers do not discriminate because they want to exclude one or two particular blacks, Hispanics, or women, but because they want to exclude *all* such people or, failing that, as many as they think they can get away with excluding. Where the resolution of a case has taken years, many of the individual victims will no longer be available for the entry-level jobs at issue. To bar relief benefitting the groups formerly excluded means, in a very real sense, that the discriminatory employer has prevailed.

[20] New York Times, December 3, 1984, pp. 1, B16.

[21] Washington Post, December 4, 1984, p. A13.

[22] Bureau of National Affairs, *EEOC Compliance Manual*, News and Developments Section for May 17, 1985, p. 4.

In point of fact, much of the Chairman's comments about statistics, adverse impact, and the testing guidelines reflect a basic misconception of the law. His public statements refer to a parade of horribles which has no basis in reality—that courts and the Commission routinely find employers liable for violating Title VII on the basis of raw statistics, without ever giving the employer a chance to explain that the numbers are incorrect, or that there is nondiscriminatory explanation—such as, that many of the minority applicants are too young to be hired, or are still in school. In reality, there is no such problem. As Judge Friendly of the Second Circuit observed twelve years ago:

> We must not forget the limited office of the finding that black and Hispanic candidates did significantly worse in the examination than others. That does not at all decide the case; it simply places on the defendants a burden of justification which they should not be unwilling to assume." *Vulcan Society of N.Y. City Fire Dept. v. Civil Service Commission*, 490 F.2d 387, 398 (2nd Cir., 1973).

Moreover, the Chairman's statements disapproving the use of statistics to establishing adverse impact, and his insistence of anecdotal proof instead, would tend to render *Griggs* a dead letter. It is hard to understand how any plaintiff could prove that a test or other selection standard disproportionately excludes members of minority groups or women unless one counts the applicants and the selections. Chairman Thomas' approach would make it hard ever to get to the point at which an employer would have to justify its practices. The Supreme Court made the same observation in 1977, in the course of holding that unrebutted statistics can *in and of themselves* prove employment discrimination, without the need for any further proof. Int'l Bhd. of Teamsters v. *United States*, 431 U.S. 324, 339-341 (1977). The Court quoted a decision of the Eighth Circuit: ". . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." United States v. Ironworkers Local 86, 443 F.2d at 551. 431 U.S. at 339 n. 20.

For the Commission to turn its back, even partway, on such a necessary tool of proof blinds it to the discrimination actually revealed in its cases, and unnecessarily hampers it in achieving its stated aim of more effective law enforcement. There is simply no occasion for the Commission to discount the use of statistical proof.

What disturbs us most about this pattern of activity is that it indicates an intense desire to "fix" things which are not broken, and to substitute personal views for the considered judgment of the courts handing down controlling caselaw in hundreds of cases. We submit that the agency would be better served by buckling down to the serious, unfinished business of eradicating discrimination.

Perhaps the most bizarre example of the tendency of senior officials of the EEOC to elevate their own preferences above the demands of the law has occurred in connection with the EEOC's lawsuit against Sears Roebuck. The Washington *Post* reported on July 9, 1985 that, while the case was under submission for decision by the court, anonymous senior officials of the EEOC were telling reporters that they hoped the agency lost the case because it would help forestall future class-type pattern-and-practice cases. A copy of the article is attached to this testimony.

Such actions are irresponsible. If the management of the EEOC believed that the types of statistical proof gathered for use in the case were infufficient to prove discrimination under the standards applied by the courts, the EEOC should have withdrawn the case on that basis. Everyone is familiar with cases in which the facts do not pan out, once a full record has been developed. Such a decision would have been professionally responsible, and would have demonstrated fidelity to the law's requirements.

CONCLUSION

Much work remains to be done to make the statutory promise of nondiscrimination a reality. The EEOC can best aid in this effort by rethinking its position on remedies, by expressly re-affirming the importance of proper statistics in proving discrimination, by making clear to local offices of the EEOC that cases may properly be based on statistical proof alone, by expressly rejecting the Justice Department's strained interpretation of the *Stotts* decision, and by abandoning its attacks on the Uniform Guidelines and on the principles used by the courts in determining the presence or absence of discrimination. The Commission's resources are limited, and they should be used more wisely.

[From the Washington Post, July 9, 1982]

Despite Class-Action Doubts, EEOC Presses Sears Bias Case

(By Juan Williams)

CHICAGO.—A strange brew of politics, law and civil rights percolates here in a 21st-floor courtroom where the Reagan administration is pouring millions of dollars into a case it philosophically would prefer to lose.

The case is a federal suit against the nation's largest retailer, Sears, Roebuck & Co., in which the Equal Employment Opportunity Commission charges Sears with discriminating against women. It is the last of several celebrated cases brought by a liberal, activist EEOC in the 1970s against corporate giants such as AT&T, General Motors, General Electric and the steel industry.

While the other big firms settled the cases with back-pay awards and hiring plans for women and minorities, Sears braved the fire from the Carter administration. Now it has a friendlier opponent: the Reagan administration.

The Reagan-run EEOC has announced its intention to move away from class-action suits on employment discrimination in favor of smaller, individual suits for persons who can prove that they, specifically, were victims of bias.

In this case, administration officials privately make little secret of their desire to lose the case, and lose it in a way that would explode any chance for future EEOC officials to bring class-action suits on the basis of statistics indicating that women or minorities are underrepresented in a company's work force.

At the same time, however, they're nervous that losing the case by default would give more ammunition to their critics and could cost them millions in addition legal fees. So while top agency officials express reservations about the case, the lawyers keep plodding along in court.

EEOC Chairman Clarence Thomas has repeatedly critised the case in public.

"I personally have problems with cases that rely on statistical evidence of discrimination [in large firms]," Thomas told a congressional hearing after Rep. Augustus F. Hawkins (D-Calif.) asked whether Thomas thought it "appropriate for you, as chairman of the commission, . . . to criticise [in newspapers] the commission's own case while the case is still before the court."

The EEOC "should not rely solely on statistics to process these [class-action] cases," Thomas said. "That was my opinion and that continues to be my opinion . . . . I do not believe that every statistical disparity between races or ethic [groups] or the sexes in the work force results from discrimination."

Thomas is not alone. A high-ranking Justice Department official who has followed the Sears case, but who refused to be quoted publicly, describes it as a "straw man we would like to have beat to death to prevent future class-action cases" by the government.

Despite its antipathy to the case, the administration continues to fund it at such high levels that EEOC officials issued a memorandum in May warning of the potential need for the agency to furlough all of its employes nationwide for one day to help pay for the case.

According to EEOC officials, the case has cost at least $2.5 million and at times has taken up more than a third of the agency's litigation budget. Yet the Sears case is only one of more than 300 cases the agency has brought in the last year.

That's not all. If Sears wins the case, the company may ask the court to require the government pay its legal fees—which could run as high as $20 million, according to some estimates.

The potential damage to the agency as well as his own philosophical opposition to the case has put Thomas in a tight political spot. "I've been trying to get out of this since I've been here," he said in an interview. "Its a case brought by my predecessor during the Carter administration, and even those people had doubts about it . . . ."

"But politically, how could I get out of it?" he said. "If I say because I don't like it I'm not going to put the money into it, then the liberals and everybody else would eat me alive. It's like the Vietnam war to me—as long as we are in it, we should fight as hard as we can to win."

But even as the final arguments against Sears were presented here 10 days ago by EEOC lawyers, top agency officials in Washington were considering whether to ask Sears to agreement, Sears would pay no fines or back-pay awards; in return, the EEOC would be protected from the threat of having to pay Sears' legal fees.

"Even the most gung-ho of the conservatives around here are concerned about the damage that will be done to the agency if we have to pay big money to Sears for its legal fees," said on EEOC lawyer. "There's some rethinking going on about keeping a lid on the cost of proving their point."

Sears has tried to make use of the great divide between top EEOC officials and the agency's legal staff that has labored on the case. Sears' lawyers tried to have Thomas travel here to give a deposition after Thomas told reporters he believed that the case, and others like it, are part of the "overextended and over-applied" use of statistics.

The court ruled that Thomas' opinion was not relevant. But Barry Goldstein, a lawyer for the NAACP Legal Defense Fund, asked at a congressional hearing: "I wonder how the lawyers . . . in Chicago on the Sears case feel about reading in the press their boss' comment about their extensive efforts . . . ."

The EEOC's lead counsel in the case, James Scanlon, 40, heads a team that includes two other lawyers and two assistants.

Scanlon would not comment on Thomas' remarks about the case. But of the argument that statistical proof of discrimination is not proof unless specific women can prove they are victims of discrimination, Scanlon said:

"How many individual instances of discrimination would one need to show to offer meaningful evidence regarding the practices of a nation-wide employer the size of Sears?

"Second, what does a person denied a position because of discrimination know about the circumstances of that decision . . . ? They don't know whether there was a vacancy, much less anything about the qualifications of the person who was, in fact, hired."

Scanlon added that a "pattern of discrimination" may exist in large companies when a pool of qualified applicants is considered but only white men, for example, win jobs.

In the closing days of the trial, under pressure from his superiors, Scanlon presented two women who testified that they believed they had been discriminated against by Sears.

Despite their testimony, the heart of the EEOC's case remains statistical: While 60 percent of applicants for sales jobs at Sears from 1973 to 1980 were women, about 27 percent of the persons hired were women. In 1972, before Sears began its affirmative-action plan, 9.9 percent of such jobs went to women.

The EEOC's study of the women applying for the jobs also found that 40 percent of them had experience in the type of sales job they sought.

The government is also charging Sears with not promoting women on its sales staff to commissioned sales jobs, which are potentially more lucrative. One Sears commissioned salesman testified that he earned about $175,000 a year.

The EEOC also contends that 72 percent of Sears noncommissioned sales staff was female but that fewer than half of the promotions to commissioned sales jobs—about 40 percent—went to women.

Sears has responded with testimony from economists, and with polls showing that women were not interested in commissioned sales jobs, which often are in fields such as house siding, plumbing and auto parts.

"Statistics can be helpful in the proof of some lawsuits," said Charles Morgan, the former head of the Washington office of the American Civil Liberties Union who now represents Sears. "[The statistics] must relate to the real world, however, and have relevance to what it is that is being measured. . . . Men and women are not equally interested in selling men's clothes and women's clothes. Men and women are not equally interested in selling drapes, plumbing, heaters, auto parts and truck tires."

The legal fight has generated animosity between Sears' senior managers and the EEOC. According to both sides, Sears officials have not wanted to settle the case but would rather defeat the EEOC and "celebrate"—a Sears official's word—in return for being dragged by the EEOC through a decade of charges of racial and sex discrimination.

The animus between the two sides spilled into public light in 1979 when Sears filed suit against the federal government, charging it with creating a work force dominated by white males and thereby forcing Sears to hire white males. Sears said the government created that white male work force with veteran's preferences and GI bill benefits. It contended that Social Security and welfare payments induced women not to work. It charged that federal age-discrimination laws had slowed the exit of white men from the company and thus the entrance of women and minorities. The suit was dismissed.

Since the Reagan administration took office, Sears has been on the offensive. The government has backtracted on race-discrimination, charges filed against Sears during the Carter years. In that settlement, the government agreed to allow Sears to avoid all back payments for victims of Sears' alleged practice of "restricting

blacks and Spanish-surnamed Americans to lower-paying, less desirable jobs, and not hiring minorities.

Although Sears settled that suit, it has allowed the sex discrimination charges to drag on.

"They don't want to settle," said an EEOC official. "They want to win and they want to rub our noses in it."

Sears officials note that they have had an affirmative-action plan requiring that women and minorities fill one of every two job openings—a quota—at the same time that the Reagan administration is suing to halt the use of quotas around the nation.

"They are fighting us over discrimination but they wouldn't even use a plan as strong as ours to do the job," said a Sears official. "Now that's hypocrisy."

Mr. MARTINEZ. Thank you, Mr. Robinson.

Ms. Nancy Kreiter.

Ms. KREITER. Thank you. I am the research director of Women Employed which is a national organization of working women based in Chicago. We appreciate the opportunity to testify before you on the subject of EEOC's remedial policies.

We believe that these policies must be evaluated in light of the EEOC's current performance. As you know, Women Employed has consistently monitored the Agency through statistical analysis and our work with complainants for over 12 years. Overall, the emphasis on fair settlements, rapid resolution of charges, and the commitment to strong enforcement that existed during the previous administration has been replaced by inaction, incompetence, and hostility to the Agency's mandate to eliminate employment discrimination and provide reasonable remedies for victims.

First, the Rapid Charge Processing System established during Norton's tenure is, practically speaking, no longer in operation. Admittedly not perfect, this system did reduce the average length of time for processing a charge to 3 to 6 months down from the previous average of 2 years.

Complainants and employers were brought together in a face-to-face fact finding conference, usually scheduled within 1 to 2 months after a charge was filed. These factfinding conferences facilitated prompt settlements and avoided extended investigations which are burdensome for charging parties, employers, and the Agency. Equal opportunity advocates, complainants, and most respondents with whom we dealt viewed this system as fair and expeditious.

However, during the current administration, charge processing has declined dramatically. In fiscal year 1984, less than 22 percent of all new charges filed resulted in some type of settlement. At the point that Reagan appointees took over the Agency, it was 43 percent of all new charges filed that were settled. Currently over 46 percent of all new charges filed are determined "no cause," compared with only 29 percent filed 4 years ago. In addition, it now takes an average of over 6 months to process one individual charge compared to between 3 and 6 months in the last full year of the Carter administration.

This administration's lack of commitment to strong enforcement can also be seen in its litigation record. As of the first half of fiscal year 1985, 40.8 percent, nearly 41 percent fewer cases were filed in court than in fiscal year 1981. This year only 91 cases were approved by the Commission for litigation, a decrease of 50 percent on an annual basis compared to fiscal year 1981.

The Chicago district office with which we have the most experience provides one of the most glaring examples of the Agency's deterioration. The Chicago office used to boast the best performance record in the Nation and was designated by Norton as one of three model offices when rapid charge processing was first implemented. In the final reporting period under the Carter administration, nearly 84 percent of all title VII charges in the Chicago district office were settled. Today less than 18 percent are settled, a figure even lower than the 20-percent nationwide rate.

Similarly, 49 percent of all charges now filed in Chicago are determined "no cause," compared with only 29 percent 4½ years ago. Again, Chicago's no cause rate is greater than the national average. And finally, during the Chicago office's peak performance years, charges filed with that office were processed and closed in as little time as 2½ weeks. Currently charge processing in Chicago takes between 6 and 8 months for all charges.

In addition, we are receiving increasing numbers of complaints of incompetence by district office staff from attorneys for complainants, as well as from complainants themselves. The growing case processing backlog is another indicator of the decline in the EEOC's performance.

During Norton's tenure the backlog of 130,000 cases which she inherited was reduced by approximately 70 percent over 4 years. The pace of reduction of the backlog has not only slowed under the Reagan EEOC, it has actually been reversed with added backlog. The EEOC itself currently estimates that it will have 65,000 unresolved charges in fiscal year 1986. This is a 96-percent increase in 4 years.

Moreover the EEOC itself reports that only 25,000 were assisted by the Agency in fiscal year 1984, compared to about 52,000 in fiscal year 1982. So particularly when viewed in the context of EEOC's poor performance, the Agency's recent policy initiatives must be opposed by all those concerned about equal opportunity. These policies will further diminish the likelihood that the EEOC will have an impact on employment discrimination. And I would like to stress that my comments are based on what is really happening in the field, regardless of supposed intent of the policies.

In September 1984 the EEOC adopted its policy statement directing the Agency to litigate each and every charge on which it issues a reasonable cause. Implementation of this policy means that Agency attorneys must be involved during the investigative process in all stages in every single case. The regional attorney must assess the merits of each case and make a recommendation to the district director. The district director must then consider recommendations of all staff involved in the case and issue a statement of reasonable cause or no cause for each of the charges filed in the district office.

It is our view that this policy will not improve enforcement. Instead, it guarantees increased delays in the resolution of cases. It is overly bureaucratic and it shifts the emphasis toward the adversarial and away from conciliation. In any case, the Agency is ill-equipped to make this change. As Bill Robinson already stated, EEOC has claimed that under their new litigation policies a number of lawsuits filed by the Agency will increase from approximately 200 to 1,000 a year.

We, too, doubt that the current agency staff could handle any such increase in caseload. In February 1985, the EEOC announced its policy statement on remedies and relief. The policy does require each district director to obtain full relief where there is reasonable cause. The EEOC will not, and is not settling discrimination charges unless the respondent meets requirements that we believe are ill-conceived and counterproductive.

First, the employer is required to notify all employees of the affected facility of their right to be free of the unlawful discrimination that occurred. That is fine, but unlike the notice posting remedy often used in NLRB settlements, the EEOC's notice can include the names of individuals who filed the charge. This provision of identifying victims by name serves no good purpose and would have a chilling effect on potential complainants, most of whom wish to avoid any notariety. In the process of supposedly remedying a charge, the EEOC would in fact be penalizing the victim.

Second, the policy provides that the respondent must unconditionally offer each identified victim the position that person would have occupied, albeit for discrimination even if the job has been filled by another person. Obviously, this policy punishes employees who are not responsible for the discriminatory act of management and it is guaranteed to sow discord and resentment, something any sensible employer would strongly resist. This provision alone should be enough to show that the Commission has a dangerous lack of understanding of its overall mission.

Third, the statement on full relief must be obtained in every case in which there is reasonable cause. This requirement stands in the way of conciliation and settlement today. It provides no flexibility to obtain relief in cases in which full scale litigation is neither necessary nor realistic. Perhaps even more disturbing is the policy's emphasis on remedies for individual victims of discrimination as opposed to classes or groups of affected women or minorities.

Chairman Thomas and the Commissioners have gone to great lengths to assure you that the EEOC is indeed continuing to process pattern and practice charges. But the Chairman has come out against the use of statistical disparities in proving discrimination cases, both the new litigation and remedial policies for the agency focus only on individual victims. And the effective and widely accepted remedy of goals and timetables for filling future vacancies has been completely omitted from either of these policies.

Chairman Thomas has stated that he does not believe that class action suits constitute the most important deterrent to discrimination. It should not be necessary to point out that in most contexts, discrimination is systemic and there is a need for programs to remedy these practices that affect large numbers of women and minorities.

We know that the expanded opportunities women and minorities have achieved in the past decade are primarily the result of action against systemic forms of discrimination, not from tackling discrimination one charge by one charge. We also feel we must comment on the EEOC's recent decision in the area of sex-based wage discrimination, because we feel this is also a new policy pronouncement.

In this case, the charging parties allege that the employer paid its female administrative staff less than its male maintenance staff even though the duties performed by these female employees required more or equal skill, effort, and responsibilities than the male employees. They also allege that the employer intentionally set wage increases for the female jobs at lower levels than the prevailing rate in the local municipal market while doing the opposite for the male dominated jobs.

We reject the Commission's reasoning that an employer's reliance on labor market data in setting wages is a nonsex based decision and therefore not proof of a violation of title VII. The idea that the so-called market is a primary factor in setting salaries; that the going rates for certain jobs are based primarily on the law of supply and demand and nothing else, is false. The going rate is the amount of money employers are willing to pay for jobs based partly on what other employers are paying on their own historic practices, who holds the jobs or old notions of what women should be paid.

The market is simply a reflection of employer decisions and historic practice. And it is not an adequate defense for wage setting practices that assign lower salaries to jobs filled predominantly by women. The Commission failed to deal with the respondent's pay setting practices in light of the dispirit impact theory encompassed by title VII.

Furthermore, in all the public relations attendant to the announcement of the Commission's decision in this particular case, Chairman Thomas made no mention whatsoever of an obvious element of the case; that is, extensive occupational segregation that was evident in the respondent's work force if the case had been properly investigated. This case deserved more thoughtful treatment from the EEOC. Instead it was used as a vehicle for a publicity laden endorsement of the status quo.

Our statistical monitoring of the EEOC's performance and our work with victims of sex and race discrimination indicate that serious attention must be given to fulfilling the agency's basic enforcement responsibilities. To those of us in the field, it is though the clock has been turned back to the pre-1980 period when it was virtually useless to advise victims to expect assistance from the EEOC. This situation must be reversed.

For the most part, the recent policy changes have a get-tough tone, but are not likely to produce real progress. The EEOC needs effective and speedy charge processing for individuals that is designed to produce fair settlement. It needs an active program to combat systemic discrimination, a clear and thoughtful position on wage discrimination consistent with title VII, and leadership committed to real progress toward equal employment opportunity.

Women Employed looks forward to working with this committee to achieve those goals, and we appreciate having the opportunity to express these views.

[The prepared statement of Nancy Kreiter follows:]

PREPARED STATEMENT OF NANCY KREITER, RESEARCH DIRECTOR, WOMEN EMPLOYED INSTITUTE

My name is Nancy Kreiter; I am the Research Director of Women Employed. We appreciate the opportunity to testify before this committee on the subject of the Equal Employment Opportunity Commission's remedial policies.

We believe that these policies must be evaluated in light of the EEOC's current performance. As you know, Women Employed has consistently monitored the agency through statistical analysis and our work with complainants for over twelve years. We have documented the steady improvements that occurred at EEOC during the tenure of Eleanor Holmes Norton, and we have documented the rapid deterioration of the agency during the Reagan administration. Overall, the emphasis on fair settlements, rapid resolution of charges, and the commitment to strong enforcement that existed during the previous administration has been replaced by inaction, incompetence, and hostility to the agency's mandate to eliminate employment discrimination and provide reasonable remedies for victims.

ENFORCEMENT

First, the Rapid Charge Processing System established during Norton's tenure is, practically speaking, no longer in operation. This system effectively produced a high rate of settlement in a time frame that brought fairness to both complainant and respondent. This system reduced the average length of time for processing a charge to three to six months, down from the previous average of two years. Conciliators and employers were brought together in face-to-face fact-finding conferences usually scheduled within one to two months after a charge was filed. These fact-finding conferences facilitated prompt settlements and avoided extended investigations which are burdensome for charging parties, employers, and the agency. Equal opportunity advocates, complainants, and most respondents with whom we dealt viewed this system as fair and expeditious.

EEOC—CHICAGO ENFORCEMENT STATISTICS

	Baltimore (fiscal year 1984)	Chicago (fiscal year 1984)	Chicago (fiscal year 1985[1])
Settlement rate—overall (percent)	21.7	20.7	53.9
Title VII only (percent)	19.8	17.9	83.7
No-cause rate—overall (percent)	46.6	48.9	29.1
Time lapse (months)	5.9–6.8	6–8.1	2-3-8

[1] First half only.

Source: EEOC district office reports.

EEOC—ENFORCEMENT STATISTICS

	Fiscal year—					
	1976	1980	1981	1982	1983	1984
Total closures (not including backlog processing)	N.A.	31,616	54,253	51,098	68,340	54,600
Settlement rate—overall (percent)	14.0	43.0	35.1	37.4	28.3	21.7
Title VII only (percent)		46.2	37.7	40.7	37.6	19.8
No-cause rate—overall (percent)	39.0	29.2	31.2	35.0	40.8	46.6
Title VII only (percent)			32.0	31.7	35.3	34.9
Average benefit	$1,400	$3,400	$4,600	$4,800	$7,584	$5,231
Time lapse (months)	24	3–6.5	5–8	5.4–8.4	4.3–7.2	5.9–6.8
Rapid charge processing			5	5.4	4.3	5.9
Age			6	7.1	5.6	
Pay			8	9.4	7.2	
Backlog remaining	130,000	37,765	20,238	9,217	6,042	

EEOC—LITIGATION STATISTICS

	Fiscal year—					
	1980	1981	1982	1983	1984	1985 [1]
Cases recommended to general counsel	393	469	401	338	284	217
Cases approved by Commission	322	364	112	102	219	91
Cases filed in court	325	368	164	136	205	169

[1] First half only.

Source: EEOC district office reports.

However, during the current administration, charge processing has declined dramatically. In fiscal year 1984, only 21.7 percent of all new charges filed resulted in some type of settlement. At the point that Reagan appointees took over the agency, 43 percent of all new charges filed resulted in settlement. Currently, over 46 percent of all new charges filed are determined "no cause" by the EEOC compared with 28 percent of the cases filed four years ago. In addition, it now takes an average of over six months to process an individual charge, compared to between 2 and 2.5 months in the last full year of the Carter administration.

This administration's lack of commitment to litigate enforcement cases also be seen in its litigation record. In the first half of fiscal year 1985, 169 cases were filed in court by the EEOC, 40.8 percent fewer on an annual basis than in fiscal year 1981 when 368 cases were filed. This year, only 91 cases were approved by the Commission for litigation, a decrease of 59 percent on an annual basis compared to fiscal year 1981 when 364 cases were approved.

The Chicago District office of the EEOC provides one of the most glaring examples of the agency's deterioration. During the Carter administration, this Chicago office boasted the best-performance record in the nation and was designated by Eleanor Holmes Norton as one of three model offices when Rapid Charge Processing was first implemented. Today, the performance record for that office went below the current national average. In the final reporting period under the Carter administration, nearly 34 percent of all Title VII charges in the Chicago District Office were settled. Today, less than 18 percent of Title VII complaints in Chicago their cases settled, a figure even lower than the 20 percent nationwide settlement rate. Similarly, 46.9 percent of all charges now filed in Chicago are determined "no cause", compared to only 28.1 percent four and one half years ago. Chicago's "no cause" rate is greater than the national average of 44.6 percent. Finally, during the Chicago office's peak performance years, charges filed with that office were processed and closed in as little time as two and one half weeks. The longest processing time was 8 months in cases which required extensive investigation. Currently charge processing in Chicago takes between 6 and 8 months for all charges. In addition, we are receiving increasing numbers of complaints of incompetence by District office staff from attorneys for complainants, as well as from complainants themselves.

The growing case-processing backlog is another indicator of the decline in EEOC's performance. During Norton's tenure, the backlog of 129,000 cases which she inherited was reduced by approximately 70 percent, or 92,000 cases over 4 years. The place of reduction of the backlog has not only slowed under the Reagan EEOC; it has actually been reversed. There were 32,417 backlogged cases remaining in fiscal year 1982; by fiscal year 1984, there were 36,903 cases backlogged. Moreover, the EEOC itself currently estimates that it will have 66,474 unresolved charges in fiscal year 1986—a 96 percent increase in four years. Overall, the EEOC reports that only 25,578 persons were assisted by the agency in fiscal year 1984, compared to 64,581 the previous year and 51,886 in fiscal year 1982.

These statistics from the EEOC's own District Office and Annual Reports and the experiences of complainants and their attorney's provide proof that the agency is neither competent nor committed enough to fulfill its responsibilities.

POLICY

Particularly when viewed in the context of the EEOC's poor performance, the agency's recent policy initiatives must be opposed by all those concerned about equal opportunity. These policies will further diminish the likelihood that the EEOC will have an impact on employment discrimination.

In September of 1984, the EEOC adopted a policy statement directing the agency to litigate each and every charge on which it issues a "reasonable cause" finding.

Implementation of this policy will mean that agency attorneys must be involved during the investigative process at all stages in all cases; the regional attorney must assess the merits of each case and make a recommendation to the District Director as to whether the case is in fact litigation-worthy; the District Director must then consider recommendations of all staff involved in a case and issue a statement of "reasonable cause" or "no cause" for each charge filed at the district office. It is our view that this policy will not improve enforcement. It guarantees increased delays in the resolution of cases, it is overly bureaucratic, and it shifts the emphasis toward the adversarial and away from conciliation. It is evident to all those committed to the achievement of equal opportunity that this shift in emphasis is a serious step backward because it will destroy the climate necessary for settlement. The Rapid Charge Processing System was instituted to encourage the prompt resolution of charges while respecting the rights of both charging party and respondent. Clarence Thomas proposed these litigation standards under the guise of strengthening enforcement, but it will have the opposite effect. In any case, the agency is ill-equipped to make this change. EEOC has claimed that under this policy, the number of lawsuits filed by the agency will increase from approximately 350 to 1000 per year. We doubt that the current agency staff could handle any such increase in caseload.

In February of 1988, the EEOC announced its new "Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination." Responding to extensive criticism from women's and civil rights organizations concerning the agency's dismal enforcement record, the EEOC announced this new "get tough" policy. The policy mandates each district director to seek what it calls "full relief" in cases where he/she has found "reasonable cause" to believe an act of discrimination has occurred against an individual. The EEOC will not settle discrimination charges unless the respondent meets requirements that we believe are ill-conceived and counterproductive.

Let us review some of the specifics of these policies. First, the employer will be required to notify all employees at the affected facility of their right to be free of the unlawful discrimination that occurred. Unlike the notice-posting remedy often used in NLRB settlements, however, the EEOC's notice could include the names of individuals who filed the charge. This provision serves no good purpose and would have a chilling effect on potential complainants, most of whom wish to avoid such notoriety. We know from years of counseling potential EEOC complainants that it is difficult enough for them to file and pursue their charges without this provision. In the process of supposedly remedying a charge, the EEOC would in fact be penalizing the victim.

Second, the policy provides that the respondent must unconditionally offer each identified victim of discrimination the position that person would have occupied if he/she had not been discriminated against, even if the job has been filled by another person. Obviously, this policy punishes employees who are not responsible for the discriminatory act for management's actions. It is guaranteed to sow discord and resentment, something any sensible employer would strongly resist. This provision alone would be enough to show that the Commission has a dangerous lack of understanding of its overall mission.

Third, the policy states that "full relief" must be obtained in every case in which a "reasonable cause" finding is made. This requirement will certainly stand in the way of conciliation and settlement, and it provides no flexibility to obtain relief in cases in which full-scale litigation is neither necessary nor realistic.

Perhaps even more disturbing is the policy's emphasis on remedies for individual victims of discrimination as opposed to classes or groups of affected women of minorities. Chairman Thomas has gone to great lengths to assure policymakers and the press that the EEOC is indeed continuing to process "pattern and practice" charges. But Women Employed believes this new policy is just further evidence that the agency is moving away from systemic approaches. The Chairman has come out against the use of statistical disparities in proving discrimination cases; both the new litigation and remedial policies for the agency focus on individual victims; the effective and widely accepted remedy of goals and timetables for filling future vacancies has been completely omitted from the new remedial policy; and Chairman Thomas has stated that he does not believe that class action suits constitute the most important deterrent to discrimination. All this leads us to believe that the EEOC's systemic program is in serious jeopardy. In most contexts, discrimination is naturally systemic, and there is a need for programs to remedy discriminatory practices that affect large numbers of women and minorities. We know that the expanded opportunities women have achieved in the past decade are primarily the result of action against systemic forms of discrimination.

We also want to comment on the EEOC's recent decision in the area of sex-based wage discrimination, a so-called pay equity case. It stands as further evidence of the agency's failure to enforce Title VII of the Civil Rights Act. In this case, the charging parties alleged that the employer paid its administrative staff (85 per cent female) less than its maintenance staff (93 per cent male) even though the duties performed by these female employees required more or equal effort, and responsibility than the duties performed by the male employees. They also alleged that the employer intentionally set wage increases for female-dominated jobs at lower levels than the prevailing rate of increase for such jobs in local municipal agencies, while awarding wage increases for male-dominated jobs equal to the level of the prevailing rate for these jobs in local municipal agencies. We reject the Commission's reasoning that an employer's reliance on labor market data in setting wages is a "non-sex based decision" and therefore not proof of a violation of Title VII. The idea that the so-called "market" is a primary factor in setting salaries—that the "going rates" for certain jobs are based primarily on the law of supply and demand and nothing else—is false. The "going rate" in the amount of money employers are willing to pay for jobs based partly on what other employers are paying, on their own historic practices, who holds the jobs, or old notions of what women should be paid. The market is simply a reflection of employer decisions and historic practice. And it is not an adequate defense for wage-setting practices that assign lower salaries to jobs filled predominantly by women than comparable jobs filled predominantly by men. The Commission failed to deal with the respondent's pay-setting practices in light of the disparate impact theory encompassed by Title VII.

Furthermore, in all the public relations attendant to the announcement of the Commission's decision in this case, Chairman Thomas made no mention whatsoever of an obvious element of the case, that is, the extensive occupational segregation evident in the respondent's workforce. This case deserved more thoughtful treatment from the EEOC; instead it was used as a vehicle for a publicity-laden endorsement of the status quo.

CONCLUSION

Our statistical monitoring of the EEOC's performance and our work with victims of sex and race discrimination indicates that serious attention must be given to fulfilling the agency's basic enforcement responsibilities. Rather than continuing to put resources into the development of new policies, the EEOC's leadership should return the emphasis to strong enforcement. To those of us in the field, it is as though the clock has been turned back to the pre-1960 period when it was virtually useless to advise victims to expect assistance from the EEOC. This situation must be reversed.

Once the agency is again fulfilling its basic mandate, we would gladly support policy changes that would make the agency more effective and strengthen sanctions. For the most part, the recent policy changes have a "get tough" tone, but are not likely to produce real progress.

The Equal Employment Opportunity Commission needs effective and speedy charge processing for individuals that is designed to produce fair settlements, an active program to combat systemic discrimination, a clear and thoughtful position on wage discrimination consistent with Title VII, and leadership committed to real progress toward equal employment opportunity. We look forward to working with this committee to achieve those goals, and we appreciate having the opportunity to express our views.

Mr. MARTINEZ. Thank you, Ms. Kreiter.

I would like to acknowledge at this time the attendance of the ranking minority member of the full Education and Labor Committee, Mr. Jeffords. Mr. Jeffords, would you like to question the witnesses?

Mr. JEFFORDS. I listened intently to testimony while I was here. I am sorry I was unable to be here. I was at the Ways and Means Committee on pension problems.

I am trying to ascertain myself what the situation is at the EEOC, and there is obviously considerable differences of opinion among the witnesses and EEOC as to what is going on in that sense. I have been on this committee for some length of time, and

have gone through with the ups and downs of the EEOC and the terrible problems it has had especially in backlogs.

I would like to ask some specific questions on some of the figures that you gave us first on the backlog one. What you said seemed to be inconsistent with your testimony. I would like you to explain that. The backlog figures that I have listed in testimony of Nancy Kreiter and right at the beginning it shows a declining backlog for the last 3 years down to a relatively small number. Eighty-five is not in there.

I am just curious as to your statement that there have been large backlog increases.

Ms. KREITER. I can understand the confusion. There is a kind of a backlog and a backlog created by a frontlog. We have the old, inherited backlog, the traditional backlog that became the mandate from constituency groups, Congress, what have you, to get rid of when Norton came in, and that is what those numbers on the chart refer to; that original $130,000 and how it diminished.

Unfortunately, what has occurred is that in the processing of new charges under the Reagan administration, a new backlog or frontlog, whatever you want to call it, has been created, so that charge processing is not keeping up with charge intake. And those overall numbers come from EEOC's own operations annual report as to the total numbers they now anticipate being faced with.

Mr. JEFFORDS. Also, I don't want to argue with the statistics for the first 3 years or 4 years of the administration, but I am more concerned about what the situation is now, and my understanding from talking with EEOC is that although the recommendations from the district office of the general counsel may have diminished over the first years of the administration, that this year they have already referred, I believe, 441, which is for the 6 months of this—through July 12, which would certainly be up or above those that—would most likely exceed those that were referred to in 1981.

I wondered whether you have noted that trend in increase, or are we talking about our present problem or past problem in that regard?

Ms. KREITER. Are you speaking of the cases recommended to the general counsel?

Mr. JEFFORDS. Right.

Ms. KREITER. And the first——

Mr. JEFFORDS. The district office of the general counsel.

Ms. KREITER. The first three quarters of the fiscal year versus the first half.

Mr. JEFFORDS. That's correct.

Ms. KREITER. Let me just say you obviously are privy to information that has not been released to public organizations under Freedom of Information Act requests. This has been an ongoing problem with this administration for our organization who has 12 years of history in obtaining on a regular basis from agencies all statistical information.

Under this administration we have had to go to court to get statistics. So the latest statistics which I have received on litigation was covering the first half. I also received, shortly before walking out of my office to come to Washington more current statistics on

closure settlement rate, no cause, et cetera. And I would like to submit next week an updated table with those numbers.

Mr. JEFFORDS. I am going to get to that in a second. Let me get through some others.

Mr. ROBINSON. Could I reply to that part of your concern, Mr. Jeffords, because it seems to me that you might be comparing apples and oranges. Their figures that they are reporting to you this year would reflect their new policy to review all failures of conciliation, which is different from the earlier policies.

A number of recommended cases that have been subjected to screening is not comparable to the review of all failures of conciliation without screening, so we have got a problem with apples and oranges. But given that, then, what you seem to me to have is the Commission reviewing some 400 odd charges and coming up with 91 lawsuits for fiscal 1985.

Mr. JEFFORDS. Well, let me get down to that.

The figures they give me for this year—and I hope that they are honestly trying to improve on some of the problems that you have pointed out, that through the first three quarters, they have referred 163 cases for suit.

Ms. KREITER. Those are cases approved by the Commission?

Mr. JEFFORDS. That's right. That's 72 for the, I guess, for the third quarter.

Ms. KREITER. On that basis it will still not get to the inadequate levels that we had in fiscal year 1980 and fiscal year 1981.

Mr. JEFFORDS. Well, assuming they add another 72, you are up to 335, which you may say is inadequate. I am not so sure that the answer to the question of whether that is good or bad necessarily is answered by statistics.

Ms. KREITER. Can I make a clarification? Did you say 163 or 263?

Mr. JEFFORDS. One hundred and sixty-three as of the end of June. Now if you added on to that, assuming they add as many as they did this previous quarter, then you are going to be up somewhere over 235, something like that.

Ms. KREITER. You are only going to be at 235, which is way under the, as I said, the inadequate levels of 1980 and 1981.

Is he talking about files or approvals?

Mr. JEFFORDS. We are talking about approvals, suits that are approved for filing or for bringing up.

Ms. KREITER. Right.

Mr. JEFFORDS. Well, that may be in that sense, but it is double what it was in 1982 and certainly a substantial improvement over 1983 and 1984.

Ms. KREITER. We appreciate that.

Mr. JEFFORDS. Yes; I just want to—certainly the trend is in the right direction. I think you would have to agree with that.

Now, as far as the—I would like a little bit more information on the determination of no cause statistics. Now that is, of course a judgment call. Now have you had or done any analysis of the non-judgment cases? I mean the judgment of no cause was rendered such that there is a bias or problem, or is this purely a statistical difference which may be created by more enthusiastic, less enthusiastic people in the field or whatever.

I mean, what I would like to know, as to those cases where there was a no cause filed, have you had substantial—come to your attention substantial criticism of that which appears to be justified in a substantial number, significant number?

Ms. KREITER. I am not sure I understand your question, but——

Mr. JEFFORDS. Let me put it this way. You said that the number of no cause relative to complaints had risen from 29 percent to 40 some odd percent. My question to you is of those that decreased in number, has there been analyses made that they are really ignoring valid complaints? Or is this just a conclusion based upon statistics?

Ms. KREITER. Well, it is both. If this, a statistic base on looking at no cause judgments issued on the basis of merit versus no cause, because of no jurisdiction or not being able to find the complainant, or all those other reasons that a case gets closed out—this is strictly of the cases they close, the percentage that on the merits are judged to be no cause.

Now, we have anecdotal evidence from complainants that we have represented and other attorneys in the area have represented of charges being no cause when it became clear that the remedial relief may not be obtainable under the new policies. And the investigator shows a definite bias to figure out why this should be no cause and therefore gotten out of the inventory of reasonable cause that has to be looked at for litigation because, in fact, many charges are not as litigation-worthy as other chargers.

But this is a drastic departure from the opportunity to obtain some sort of settlement. It may not be what the charging party expected when he or she walked into the agency and said this is what I want; a, b, c, d, e. And it may not be what the employer said—no way am I giving anything. But there used to be an opportunity for both of those parties to walk out the door and feel that from the victim's standpoint that they had been aggrieved and from the employer's standpoint that they gave something up, but it was fair and it was an acceptable settlement to them. We don't have that anymore

Mr. JEFFORDS. Well, I'm not sure you answered the question that I had. I mean I can't disagree that that is nice to occur, but my point is the charges—the implications from your statistical charges that a lot of people who deserve to have remedies given them are not. And that is the charge, and I would certainly appreciate it if you can, without utilization of names, you could give us the evidence that that is the significant reality. Thank you.

Ms. KREITER. There is no evidence that the charges being filed today versus a year ago, versus 4 years ago are any different in nature. Discrimination hasn't changed, and the merits remain the same. The investigation and the determinations have changed.

Mr. ROBINSON. We have had some recent experience that Mr. Seymour could share just briefly.

Mr. MARTINEZ. The time of the gentleman has expired, but go ahead.

Mr. SEYMOUR. This concerns a case that we filed in court recently in a Southern State. I won't mention the name of the respondent or the names of the charging parties, but the experience is truly a horrifying one.

The local area has a very large black population. Among those looking for entry level factory work, figures maintained by the local State employment service, which is the only employment agency in the area, about 80 percent of the applicants are black. The company had a new plant manager come in a couple of years ago, and this is a very bigoted person from what the employees say.

The rate of hiring blacks went down from about 75 to 80 percent to about 40 percent. The EEOC informed us it was not allowed to look at that falloff in the rate of hiring blacks because that is a statistic, and they are no longer allowed to look at statistics in determining whether there is reasonable cause to believe a charge of discrimination is true.

One of the claims we made in the case was that the company was also not giving out application forms to blacks who were trying to apply. The company was turning some people back at the gate. They managed to get inside the plant by coming in with employees. The company would tell them that it was not handing out application forms.

Black employees would see whites filling out application forms. They would fill them out in the employee break area. At the same time, they would say I want to get an application form for my wife or brother, whoever and they would be given the same deceitful statement. The company did allow some to file application forms, but again, it is a rate much lower than the figures that the area would suggest.

The position of the EEOC on that question was if they did not fill out an application form, their rights were not violated under title VII so the discriminatory figure to give out the form immunizes the employer from reach under that area.

I was then asked the following question about some of the complaints that we have inside the plant. Sample complaint: a black employee was assaulted by a supervisor. There is one supervisor at the plant that routinely calls black employees working underneath his supervision on the production line "dumb [deleted]," or "black [deleted]."

The person in charge of this investigation for the EEOC said to me, "How are we supposed to investigate something like that?" I asked him whether he considered going out to the plant and talking with the people who work on the production line; taking a look inside employee folders and seeing this kind of information. It came as news to him that that kind of effort might be called for. That's why we consider this a horrifying experience.

And I submit that there may be a misunderstanding by the local EEOC office as to the value of statistics. But when you have commissioner, after commissioner, after commissioner saying, "We disapprove of the use of statistics," things like the Washington Post article a couple of days ago about the Sears case is attached to our testimony. You have to expect that there is going to be a pull-back in local offices.

They cannot enforce the law when they are doing this. They can't have any meaningful increase in meaningful cases, while they have these kinds of confusion while they are approaching charges in this manner. Thank you.

Mr. MARTINEZ. Would you state your name again for the record, please?

Mr. SEYMOUR. Richard Seymour, director of the employment discrimination project of the Lawyers Committee.

Mr. MARTINEZ. Thank you.

Mr. Henry.

Mr. HENRY. Thank you, Mr. Chairman, I want to thank all the witnesses—I guess all three of the witnesses now for really what I consider a very helpful and excellent testimony.

I would like to ask the witnesses, does the EEOC have kind of an advisory panel that it refers to when it is promulgating new guidelines for remedy, for enforcement, that constructively works with them and advises them on establishing new policies such as those that they are promulgating?

Mr. ROBINSON. I am unaware of an advisory committee as such, but I have to plead guilty to not being a terribly shy and retiring person. So when, for example, they decided to review the testing guidelines and I saw that document, I called Clarence up. And I went over and sat down with Clarence Thomas and Fred Alvarez and I just kind of told them the same things that I have told you this morning, in essence. I even took a peace offering to Clarence with me. I took him a bag of jelly beans.

Ms. KREITER. I am not aware either of any formal advisory panel. It used to exist.

Mr. HENRY. That was my next question. Did you have such an advisory panel that formerly existed that was well known to civil rights——

Ms. KREITER. Well, it existed for women. Cher Norton set one up and the evolution of it came when the Equal Pay Act jurisdiction was transferred from the Department of Labor to EEOC. Women's groups advocates, of course, were very concerned with continued strong enforcement, and at our urging and then Norton's formulation an ongoing advisory group of women's organizations was set up that met on a quarterly basis to discuss any policy iniatives, any enforcement matters, or whatever wanted to be brought to the floor. And that was a regular meeting.

Now, I don't think it was formally established in any record form. It was something that she personally put her hand stamped approval on.

Mr. HENRY. No; you know that existed for women.

Ms. KREITER. right.

Mr. HENRY. Did it exist for other areas during the Carter administration, for example?

Mr. ROBINSON. Not that I know of. But there was a great deal of informal commuication and discussion during the Carter years, much more than in recent years, both discussion and dialog with civil rights organizations and business organizations and unions so that without having the formal advisory committee for groups other than women, there was still a considerable amount of dialog.

Mr. HENRY. And a breakdown of communication as a result if it makes your job not only harder, but also their own. And it might be important for them to recognize that.

Mr. ROBINSON. I would suggest that that is indeed the case, and I would be perfectly happy to share our assessment of things like the

two policy statements we have discussed this morning with them before we get to an oversight hearing.

Mr. HENRY. Thank you.

Mr. MARTINEZ. Thank you, Mr. Henry.

I have one question that I want you both to respond to. I find a little inconsistency in policies between two different departments, and it comes about because of the *Stotts* case. The inconsistency, in my mind anyway, comes from EEOC's new five point program which attempts to make the victim as whole as we can.

One of them, as required, is that each identified victim of discrimination be offered placement in the position that the person would have occupied had the discrimination not occured. And that is bumping. I would call that a bumping policy, a policy that is stated by the Commission for Victim Relief.

I would like both of you to respond to that.

Ms. KREITER. Well, I think it is an example. I mean I said that the policy initiatives had a get tough tone. I think that is a great example of overkill rhetoric, where you introduce a concept that has neither practical nor legal sense to it to show that you are real strong enforcement so that you finally, you know, hold out something there in enforcement. And what you get are victims saying, no, thanks. I mean that is not the way I want to get my remedies. And quite frankly we were absolutely appalled at that requirement within the policy statement.

Mr. MARTINEZ. Mr. Robinson.

Mr. ROBINSON. Yes; I certainly agree with Nancy, but that same policy statement omits any reference to the use of goals and timetables of which is, I would suggest, inappropriate. It should include the use of those remedies as well and simply skirt the problem in *Stotts* by not including goals and timetables as part of a layoff remedy where there is a seniority system. That would be much more important than a superficially get tough policy concerning bumping.

Mr. MARTINEZ. Well, thank you both for sharing your views with us. We appreciate it, and we look forward to communicating with you again. The record will be left open to accept the information that you wanted to provide us with.

Ms. KREITER. Thank you.

Mr. MARTINEZ. The next panel consists of Wayne Cascio, professor of psychology, University of Colorado, American Psychological Association and Benjamin Schneider, professor of psychology, University of Maryland, American Psychological Association. Mr. Cascio will begin. Did I pronounce that right?

STATEMENTS OF WAYNE CASCIO, PROFESSOR OF PSYCHOLOGY, UNIVERSITY OF COLORADO, AMERICAN PSYCHOLOGICAL ASSOCIATION AND BENJAMIN SCHNEIDER, PROFESSOR OF PSYCHOLOGY, UNIVERSITY OF MARYLAND, AMERICAN PSYCHOLOGICAL ASSOCIATION, A PANEL

Mr. CASCIO. Cascio, yes.

Mr. Chairman and members of the committee, I am pleased to testify today on the subject of the uniform guidelines on employee

selection procedures on behalf of the 76,000 members of the American Psychological Association.

I would like to begin by putting the issue into perspective and pointing out that every public opinion poll based on representative national samples that have been conducted from 1950 on to the present has shown that a majority of Americans—blacks, non-Hispanics and Hispanics, supports the concept of equal employment opportunities and rejects differential treatment based on race regardless of its alleged purposes or results so there is agreement about the ends to be achieved, but there is disagreement about the means to be used.

Psychologists generally agree that the caliber of employment practices and organizations has improved dramatically since publication of Uniform Guidelines, relative to the situation that existed prior to their publication. There is also general agreement that properly validated tests and other selection procedures can play a very useful role in helping employers to choose better qualified applicants from less qualified applicants, and that the better matching of people and their talents to jobs enhances the economic productivity of a workforce or a nation.

But beyond these general areas of agreement there is considerably less of a consensus among professional psychologists regarding the proper course to pursue with respect to the Uniform Guidelines. And it seems to us that three alternatives seem plausible. No. 1, abandon the Uniform Guidelines completely; No. 2, retain them as is; and No. 3, revise them to reflect more recent research findings and court rulings.

And I would like to just take a few minutes to summarize each of these three positions. First let's take a look at abandonment. Abandonment of the Uniform Guidlines receives virtually no support among professional psychologists for two reasons. First, the history of employment practice prior to the publication of the guidelines suggests that if compliance with the generally accepted professional standards is left to the discretion of employers that many will choose not to comply. And this would represent a step backwards with respect to equal employment opportunity.

Second, precedents that are embodied in case law that is based upon the 1978 Uniform Guidelines will take on a permanent character and this will make it difficult for subsequent case law to reflect more recent scientific findings. The second option is retention of the guidelines as is. Some psychologists feel that the Uniform Guidelines should be retained as is.

They feel this way because they recognize that revision is both a political as well as a scientific process, and that if revision results in a weakening of the guidelines rather than a strengthening of them, based on more recent research findings and court rulings, then revision might actually retard the progress of equal employment opportunity.

Besides, they argue that the present Uniform Guidelines do allow for modification of their requirements based on subsequent research findings. And I would like to point out that the introduction to section 14 of the Uniform Guidelines says that nothing in these guidelines is intended to preclude the development and use of

other professionally accepted techniques with respect to the validation of selection procedures.

Now advocates of revision frequently cite two findings from research conducted after 1978. No. 1, that the job performance of blacks and English-speaking Hispanics is not systematically underpredicted by tests of mental or cognate abilities and therefore the requirement that employers conduct studies of test fairness for these groups is unnecessary.

The second thing they argue is that tests demonstrated to be valid predictors of job performance in one employment situation will in all likelihood be valid in other similar employment situations; that is, validity generalization is the rule rather than the exception. Validity generalizes from one situation to another for similar jobs. So they argue that the case-by-case studies of the validity of employment tests are wasteful and unnecessary.

Now proponents for retention of the guidelines as is counter that the present guidelines don't require that a fairness study be done in each and every instance. Specifically they point to section 14, 8(b) of the Uniform Guidelines which states that where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question, and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue so the present guidelines seem to allow for the fact that fairness studies need not be conducted in each and every instance.

Now, with respect to the subject of whether or not validity generalizes across situations, proponents for retention argue that section 7(b) of the guidelines does allow employers to rely on validity evidence that has been developed in other situations as long as the jobs are similar and as long as that validity evidence does comply to the requirements of the present guidelines and that fairness evidence is available as well.

The final option is revision of the 1978 Uniform Guidelines and a number of psychologists do feel that revision of these guidelines is warranted by subsequent research findings. At the very heart of their arguments is the contention that the 1978 guidelines are based upon the discredited theory that the validity of a test varies across situations, and that hence a new validity study is required in each and every instance in which a given test is used; that is, the present guidelines make no provision for cumulative information.

The research evidence, on the other hand, as I pointed out indicates that if the test is valid in one situation for a given job such as computer programmer, it is likely to be valid in other situations where that same test is used to select computer programmers. The major reason why these validities appear to vary from one situation to the next is that different numbers of applicants or employees are used in the two or more situations, but when the effect of differences and sample sizes control statistically the validities, in fact, are very stable from one situation to another.

In other words, situation specificity is out, and validity generalization is in. Advocates for revision argue that the Uniform Guidelines should be revised to reflect this fact. I also cite several other arguments in support of revision. The most important of these is as

follows, and that is as they are presently written, they argue it is very difficult for employers to comply with the validity requirements of the guidelines.

Now the guidelines point out three strategies, or suggest three strategies that can be used to validate selection procedures. And I would just like to talk about each one briefly.

They identify criterion-related validity, content validity or construct validity. Criterion-related validity support for any precedure that will use criterion-related validity rests on the demonstration of a statistical relationship between performance on the test and actual performance on the job, such that if an employer can show that people with higher levels of job relevant ability do better on the job than people with lower levels of this job relevant ability, then it is proper, entirely proper, to use that written test or other selection procedure.

Under a content validity strategy, the employer attempts to show that by a representative sampling of the tasks to be accomplished in a job, that a test fairly samples job requirements. And last, a construct validity strategy requires that an employer identify the psychological trait or the construct such as leadership ability that is presumed to underly successful job performance, and then devise a selection procedure that accurate and fairly measures that construct.

Now, proponents of revision argue that criterion-related validity is appropriate when it is technically feasible, and the guidelines point that out in section 14(b)1. A subsequent research has shown that for many employers they can't use criterion-related validity because they don't have the numbers of employees or applicants to produce reliable statistical results. So then they are left with the choice between content or construct validity.

Now content validity, as it is described in the Uniform Guidelines, is appropriate only for work sample tests such as typing or arc welding. Generally, it is inappropriate for tests of job knowledge or of mental abilities, and according to section 14(c)1 of the guidelines, a selection procedure that is based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity.

So in short, if the selection procedure focuses on work products, then content validity is appropriate, but if it focuses on work processes, then content validity is inappropriate. Now, advocates of revision argue that even work products like memory are determined by work processes like answers to questions. So if we begin to talk about mental processes, the Uniform Guidelines automatically interpret them as constructs, and therefore content validity is inappropriate.

Now, that leaves employers with the final choice, and that is to use construct validity to demonstrate the job-relatedness of some selection procedure. The Uniform Guidelines point out in section 14(d)1 that construct validity involves a series of research studies that include criterion related validity and which may include content validity studies as well.

Now, earlier we noted that for most employers criterion related validity studies are technically not feasible so that also makes construct validity studies technically not feasible for employers. So ad-

vocates of revision argue that the net result is that there is almost no way for an employer to comply with the validation requirements of the guidelines for every approach is successively ruled out.

Several other arguments that are offered by proponents of revision and one of these we have already touched upon, and that is that employers find themselves in a sort of Catch 22 situation with respect to the use of construct validity. It is criterion-related validity is a less demanding strategy than construct validity. And in fact, construct validity requires that criterion-related validity be used as a component of that effort.

So, if it is at all technically feasible, employers will use criterion-related validity. They will only use construct validity as a last resort. But in order to use construct validity, they have to do a criterion-related validity study so they are caught between a rock and hard place, they argue.

Another argument for revision stems from the requirement of enhanced validity and utility for the use of top down ranking of candidates as opposed to grouping them in a pass/fail fashion. Section 5(g) in the guidelines points out that a higher standard for validity and utility is required in order to allow an employer to use top down ranking.

But there has been a massive amount of research in the psychological literature that shows that almost without exception higher amounts of a job relevant ability lead to higher levels of job performance, so the selection of people with higher levels of ability relative to those with lower levels of this job relevant ability leads to higher levels of job performance whether we look at that in terms of less waste, fewer accidents or greater output. And that translates into improved economic productivity for an organization.

Now psychologists who argue that the guidelines ought to be revised say that the requirement for enhanced or a higher standard of validity evidence to justify top down ranking is both unnecessary and it is economically wasteful. They say it is unnecessary because in almost all instances higher levels of job-related abilities lead to improved performance. They say that it is economically wasteful because if we rely on pass/fail grouping of candidates, then their subsequent job performance will be lower than if we relied upon strict top down ranking, and that results in a cost in economic terms and in terms of productivity for organizations.

Now, the final argument that is advanced by advocates of revision pertains to the requirement in the guidelines that there be a search for alternative selection procedures where two or more procedures are shown to be equally valid. The guidelines point out that users should rely on the one that produces less of an adverse impact.

Well, since publication in 1978 of the Uniform Guideline there have been three very well-controlled studies that examined the validity, the fairness, and the feasibility of actually using alternatives in practice, alternatives to standardize tests. In all three studies, there was no evidence that any alternatives met the criterion of having equal validity with less adverse impact. So this kind of evidence suggests that the requirement that employers continued to

search for equally valid alternative selection procedures as is currently required under the 1978 guidelines is unnecessary.

I would be pleased to provide additional information or answer any questions that you might have.

[The prepared statement of Wayne Cascio follows:]

PREPARED STATEMENT OF WAYNE CASCIO, PH.D., ON BEHALF OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION

Mr. Chairman, members of the Committee, I am Dr. Wayne Cascio, professor of Psychology at the University of Colorado at Denver. I am pleased to testify today on the subject of the Uniform Guidelines on Employee Selection Procedures on behalf of the 76,000 members of the American Psychological Association (APA).

Every public opinion poll based on representative national samples drawn between 1950 and the present shows that a majority of Americans, black, white non-Hispanic, and Hispanic, support equal employment opportunity and reject differential treatment based on race, regardless of its alleged purpose or results. There is agreement about the ends to be achieved, but there is disagreement about the means to be used.

Psychologists generally agree that the caliber of employment practices in organizations has improved dramatically since publication of the Uniform Guidelines, relative to the situation that existed prior to their publication.

There is also general agreement that properly validated tests and other selection procedures can play a useful role in helping employers to choose better qualified from less qualified applicants, and that better matching of people to jobs enhances the economic productivity of a workforce and of a nation.

Beyond these general areas of agreement, there is considerably less of a consensus among professional psychologists regarding the proper course to pursue with respect to the Uniform Guidelines. Three alternatives seem plausible: (1) abandon the Uniform Guidelines completely, (2) retain them as is, or (3) revise them to reflect recent research findings and court rulings. Let's examine each of these in greater detail.

ABANDONMENT

Abandonment of the Uniform Guidelines receives virtually no support among psychologists for two reasons. First, the history of employment practice prior to the adoption of the Uniform Guidelines suggests that if compliance with generally accepted professional standards is left to the discretion of employers, many will choose not to comply. This would represent a step backwards with respect to equal employment opportunities.

Second, precedents embodied in case law that is based upon the 1978 Uniform Guidelines will take on a permanent character. This will make it difficult for subsequent case law to reflect more recent scientific findings.

RETENTION

Some psychologists feel that the Uniform Guidelines should be retained as is. They feel this way because they recognize that revision is a political as well as a scientific process. If revision results in a weakening of the standards, rather than a strengthening of them based on recent research findings and court rulings, then revision may actually retard the progress of equal employment opportunity.

Besides, the present Uniform Guidelines allow for modification of their requirements, based on subsequent research findings. The introduction to Section 14 of the Uniform Guidelines states: "Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to validation of selection procedures."

Advocates of revision frequently cite two findings from research conducted after 1976: (1) that the job performance of blacks and English-speaking Hispanics to *not* systematically underpredicted by cognitive ability tests, and therefore the requirement that employers conduct studies of "test fairness" for these groups is unnecessary; and (2) tests demonstrated to be valid predictors of job performance in one employment situation will, in all likelihood, be valid in other similar employment situations; that is, validity generalization is the rule rather then the exception. Case-by-case studies of the validity of employment tests are therfore wasteful and unnecessary.

Proponents of retention of the Uniform Guidelines counter that the present guidelines do not require that fairness studies be done under all circumstances. Specifically, Section 14(b)8b of the Uniform Guidelines states:

"Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue."

With respect to point (3) above, proponents of retention argue that Section 7(B) permits employers to rely on criterion-related validity evidence from other sources, that is, "studies conducted by one test user, or described in test manuals and the professional literature," as long as three requirements are met: (1) The validity evidence must satisfy the requirements of Section 14B of the Uniform Guidelines; (2) jobs in the two situations must be similar, as indicated by a job analysis; and (3) there must be evidence of test fairness for the groups for whom the test is intended to be used.

REVISION

A number of psychologists feel that revision of the Uniform Guidelines (1978) is warranted by subsequent research findings. At the heart of their arguments is the contention that the Uniform Guidelines are based upon the discredited theory that the validity of a test varies across situations, and hence that a new validity study is required in each and every instance in which a given test is used. That is, the present guidelines make no provision for cumulative information. Thus if an employer in Seattle is selecting computer programmers, as is an employer in New York, and both are using the same test to select programmers, the present guidelines require that two separate studies be done to demonstrate that the test accurately forecasts job performance. They make no provision for the fact that if the weight of scientific evidence for this test indicates that it is valid in all situations used to select computer programmers, then neither the employer in New York nor the employer in Seattle need conduct a validity study to demonstrate that the test accurately forecasts the job performance of programmers in these two situations. Research evidence indicates that if the computer programmer test is valid in one situation this finding will generalize to other similar situations. The major reason why validities appear to vary from one situation to another is that sample sizes in different studies vary to a great extent. However, when the effect of variability in sample size across studies is removed statistically, research indicates that validities are remarkably stable across situations. In other words, "situation specificity is out; validity generalization is in." The Uniform Guidelines should be revised to reflect this fact.

Advocates of revision cite four other arguments in support of their position. First, as presently written, it is extremely difficult for an employer to comply with the validation requirements of the Uniform Guidelines. The guidelines suggest three strategies that employers may use to demonstrate the job relatedness (that is, the validity) of their selection procedures: (1) criterion-related validity, (2) content validity, and (3) construct validity. Each of these strategies is described briefly below, in accordance with the Uniform Guidelines (Overview, Section VII).

In criterion-related validity, a selection procedure is justified by a statistical relationship between scores on a test or other selection procedure and measures of job performance. In content validity, a selection procedure is justified by showing that it representatively samples significant parts of a job, such as a typing test for a typist. Construct validity involves identifying the psychological trait (the construct) which underlies successful performance on the job and then devising a selection procedure to measure the presence and degree of the construct. An example would be a test of "leadership ability."

Criterion-related validity is an appropriate strategy when "technically feasible" (Section 14B(1)). Research has shown, however, that for most employers this strategy is inappropriate since they lack the sample sizes (the numbers of employees or applicants) required to do a proper criterion-related validity study.

Content validity, as described in the Uniform Guidelines, is appropriate only for work sample tests (e.g., typing, welding), and generally inappropriate for job knowledge or cognitive ability tests. According to Section 14C(1): "A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity."

In short, if a selection procedure focuses on work products, content validity is an appropriate strategy; however, if the focus is on work processes, then content validity is inappropriate. Advocates of revision argue that even work products like "memory" are determined by work processes, such as "answers to questions." If we

talk about mental processes, the Uniform Guidelines automatically interpret them as constructs, and therefore content validity is inappropriate. Yet, whenever employers attempt to measure characteristics such as judgment, stamina, or reading comprehension, they make inferences to mental processes. In practice, job sample tests are simply not feasible for many entry-level jobs, and they are often economically infeasible for higher-level jobs.

Finally, a user is left with a construct validity strategy to demonstrate the job relatedness of a selection procedure. But the Uniform Guidelines state in Section 14D(1):

"The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion-related validity studies and which may include content validity studies."

We noted earlier that for most employers, criterion-related validity studies are technically infeasible. This, of course, also makes construct validity studies technically infeasible. Advocates of revision argue that the net result is that there is no way for an employer to comply with the validation requirements of the Uniform Guidelines, for every approach is successively ruled out.

To some extent, we have already touched upon the second argument advanced by advocates of revision. That is, that employers find themselves in a "Catch-22" situation with respect to construct validity. That is, as defined in the Uniform Guidelines, criterion-related validity is a less demanding strategy than is construct validity. Hence, if at all possible, employers will seek to conduct criterion-related validity studies. The only reason why they might seek to do a construct validity study is because no other alternative is feasible. Yet the Uniform Guidelines note that a criterion-related validity study is a necessary part of a construct validity study. But if the criterion-related study is infeasible, then a construct validity study cannot be done either! Advocates of revision argue that a much more careful definition of construct validity is required in order for this strategy to be a meaningful alternative to employers.

The third argument for revision pertains to the use of top-down ranking of job candidates versus pass-fail grouping. Section 5G of the Uniform Guidelines states: "Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis . . . the user should have sufficient evidence of validity and utility to support the use on a ranking basis."

A massive amount of research has shown that almost without exception, higher amounts of a job-relevant ability lead to higher levels of job performance. The selection of persons with higher abilities, relative to those with lower abilities, in turn, leads to higher levels of job performance. And higher levels of job performance, whether that be in terms of less waste, fewer accidents, or greater output, translates into greater economic returns (that is, economic utility) for an organization.

Psychologists who advocate revision of the Uniform Guidelines argue that case-by-case evidence of superior validity and utility for ranking versus pass/fail grouping of job candidates is unnecessary and economically wasteful. It is unnecessary because ability and performance are almost always directly related to each other. Hence, ranking will be more validity than pass/fail grouping. It is wasteful to the extent that lower productivity results from the use of any strategy other than top-down ranking of candidates. This in turn leads to a loss in economic utility to the organization.

The final argument advanced by advocates of revision pertains to the required search for alternative selection procedures that is mandated by the Uniform Guidelines, the so-called "cosmic search." Section 3B states:

"Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact."

Since the publication of the Uniform Guidelines in 1978, three well-controlled studies have examined the validity, fairness, and feasibility of operational use of alternatives to standardized tests. In all three studies there was no evidence that any alternatives met the criterion of having equal validity with less adverse impact. This kind of evidence suggests that any requirement that employers continue to search for equally valid alternative assessment procedures, as is currently required under the Uniform Guidelines (1978) is unnecessary.

I would be pleased to provide additional information or answer any questions you might have. Thank you.

Mr. MARTINEZ. We will hear from the other witness before we ask the questions. Mr. Benjamin Schneider, would you like to give us your testimony?

Mr. SCHNEIDER. Thank you, sir.

Mr. Chairman, members of the committee, I greatly appreciate the opportunity to testify before the Subcommittee on Employment Opportunities regarding the uniform guidelines on employee selection procedures. I am Dr. Benjamin Schneider, professor of psychology at the University of Maryland, and I am here on behalf of the American Psychological Association and the Society for Industrial and Organizational Psychology, Inc., a division of the American Psychological Association, also known as APA.

As president of the Society for Industrial and Organizational Psychology, I thought it was important for the subcommittee to have the society's input because of the central role the uniform guidelines play in the science and practice of my field.

In brief, my sense of the field's opinion is that the present uniform guidelines fail to adequately represent contemporary scientific knowledge, and thus, do not represent good contemporary practice. It is not that the guidelines were poor, it is that since they were written considerable progress in a number of specific areas has been made. Indeed, progress in some areas has resulted in the society's "Principles for the Validation and Use of Personnel Selection Procedures," 2d edition, revised in 1980, undergoing revision again. We expect to complete this second revision in the next six months. Copies of the current edition are available to the committee if they so request.

More specifically, I have chosen to present here four issues that are inadequately discussed in the uniform guidelines.

No. 1, validity generlization: there is now good scientific evidence to indicate that for broad classes of jobs and broad classes of cognitive ability tests the relationship between ability and performance is positive and generalizable across settings. This means that in many cases it is unnecessary to conduct new validity studies each time an ability measure is to be used as a basis for making hiring decisions.

From the standpoint of economics, then, results from validity generalization studies have been obviously encouraging. Of at least equal interest has been the finding that the typical validity study, using small available samples, may yield incorrect inferences about selection procedure validity. Of course, it is necessary for us to define the conditions under which validity generalization is supportable.

No. 2, content validity: progress in building measures that tap into knowledge, skills and abilities—in our language, KSA's—required to perform a job indicates that wide range of selection procedures, including but not only job sample tests, can be useful in assessing job applicants; that is, there are a variety of ways to assess the extent to which applicants possess the KSA's necessary for effective performance, and these include simulations of jobs that require KSA's like the job, simulations that require applicants to learn tasks like those to be performed, and paper and pencil tests that assess the cognitive skills that jobs may require. The content,

in a measure, needs to assess the KSA's required for job performance not the exact task behaviors the job may demand.

I should note here that actual job sample tests are frequently not feasible from an economic standpoint and they deny our documented capability to assess DSA's without having a physical representation of the job. Again, researchers in our field are now defining the conditions and procedures concerning the establishment of content validity.

No. 3, differential prediction: our scientific literature indicates that there are no grounds for assuming that selection procedures work differently for persons of different racial subgroups. The uniform guidelines, however, require assessments of differential prediction in each situation when feasible. Not only is there no evidence for differential prediction, but in each situation it is typically not feasible to make such an evaluation because of small sample sizes.

The National Academy of Sciences report on ability testing put it this way:

> The committee has seen no evidence of alternatives to testing that are equally informative, equally adequate technically, and also economically and politically viable, and little evidence that well-constructed and competently administered tests are more valid predictors for a population subgroup than for another. Individuals with higher scores tend to perform better on the job regardless of group identity.

No. 4, utility analysis: I have raised the issue of economics in each of the previous topics because our scientific literature now suggests that considerable financial benefits can accrue to organizations that employ competently developed employee selection procedures. My colleague today, Wayne Cascio, has been at the forefront of such research.

Simply put, the uniform guidelines do not take much cognizance of this literature or the procedures for conducting economic utility analyses. In a time when productivity in the work place is a national concern, the issue of utility is important enough to be present in a guidelines document.

I have been addressing some issues that science and practice in my field since 1978 suggests make the current uniform guidelines out of date. We thus feel the subcommittee has only two alternatives regarding the future of the uniform guidelines: revise them to take advantage of contemporary knowledge and practice, or drop them in favor of a professional practices doctrine.

In either case, the society for I–O Psychology, as I noted earlier, will revise its principles. We will do this as part of a continuing educational service to our members, acquainting them with the most up-to-date knowledge relevant to our professional practice. We hope that other users of employee selection procedures also find our principles useful.

Thank you for this opportunity to testify. I would be happy to answer any questions you have.

Mr. MARTINEZ. Thank you.

Dr. Cascio, in your testimony you stated that the current section 14 of the uniform guidelines already provides a vehicle to include the development and use of other professionally acceptable techniques with regard to the validation of selection procedures. Why do we need to change them or remove them?

Mr. CASCIO. Well, I think that—and I am speaking on behalf of members of the association and not myself and trying to put myself in the shoes of those who argue for retention of the guidelines as is. And one of the arguments that comes up is the fact that——

Mr. MARTINEZ. Excuse me. You mentioned the three groups. Which one do you belong to?

Mr. CASCIO. Well, I am a member of the APA's Committee on Psychological Testing Assessment. We are in the camp that argues for retention of the guidelines as is.

People argue that there are different ways—the same words are interpreted differently depending on whether you happen to be on the plaintiff's side or on the defendant's side. And the argument of those who argue for retention is that a careful reading of the guidelines doesn't rule out the newer methods that have been developed.

Mr. MARTINEZ. I see. But what would happen if the uniform guidelines were removed? Would there be adequate control of unlawful discrimination selection procedures?

Mr. CASCIO. Well, the only way to answer that one, I believe, is by looking back at the history of what happened before we had guidelines and that history is a pretty sorry one, sir.

Mr. MARTINEZ. Do you agree that the job performance of blacks and English-speaking hispanics is not systematically underpredicted—by cognitive ability testing?

Mr. CASCIO. Yes, sir; I do.

Mr. MARTINEZ. How do you explain poor minority performance on these test areas?

Mr. CASCIO. Well, it is important, I think, to point out that in looking at the issue of unfairness in testing, that we can't just look at the test itself. We have got to look at how people actually would do on the job. So to the extent that the test itself is an accurate predictor of what is likely to happen, if people who do poorly on the test are hired, then poorer test performance by some group is an indicator of predicted poor job performance as well.

There is a real danger if unfairness were to exist where you have, for example, hispanics and whites who score at the same level on a test, but the job performance of the white group is predicted to be higher than that of the hispanic group, because then the hispanic simply will not be hired in the first place. And the evidence to date indicates that that is not the case, at least for cognitive mental ability tests; that that is not the case.

Mr. MARTINEZ. Does adverse impact evaluation of selection practice have a proper place in assessing fairness of procedures?

Mr. CASCIO. They are two separate issues, sir. They are two separate issues. Clearly when adverse impact is demonstrated, it is critical that we be able to show that whatever procedures are being used are in fact job-related. Even if there is no adverse impact in the issue just on general moral and ethical grounds, it is important that employers use the most valid procedures available.

If the guidelines only require them to validate procedures if adverse impact is shown, I guess from our professional point of view, we argue that it is important that employers demonstrate the job-relatedness of their selection procedures whether or not they have adverse impact.

Mr. MARTINEZ. Thank you, Mr. Cascio.

Dr. Schneider, do you agree that the selection procedures often, by intention or by structure result in unlawful discrimination against workers?

Mr. SCHNEIDER. The testing procedures that have been competently developed according to procedures like those in current Uniform Guidelines and like those in the society's principles do not tend to yield unlawful discrimination, sir.

Mr. MARTINEZ. Assuming that eradicating unlawful discrimination is an important policy goal, how would you monitor selection procedures except by using aggregate statistics and by using differential controls and comparisons.

Mr. SCHNEIDER. The differential controls and comparisons is a separate issue now, I am convinced, from whether or not there is discrimination in hiring. The issue of the selection procedure itself, that is the differential prediction issue, which has been, I think, very well resolved in our literature, and it shows that there is not differential prediction.

Some organizations, however, continue to discriminate, and that is the separate issue as Dr. Cascio indicated. I think there are times in the current Uniform Guidelines where the issue of adverse impact and equal employment opportunity get inextricably confounded with the issue of selection validity.

Mr. MARTINEZ. How do you explain the fact that minorities consistently score lower on ability tests than their majority counterparts? Or what is your explanation when it does occur?

Mr. SCHNEIDER. I think there are two different kinds of issues being raised by your question, sir. One question has to do with some generalized concept—maybe you refer to, for example, general intellectual intelligence tests. That, I think, is a fairly distinct issue from whether or not different people in different subgroups perform differently on job relevant mental ability and job performance tests.

I think there is less evidence for the latter condition than for the former condition.

Mr. MARTINEZ. How about criterion tests?

Mr. SCHNEIDER. I'm sorry, I don't understand the question, sir.

Mr. MARTINEZ. OK, let me go on to a different one, then.

In this last sentence on page 8 you state the content in a measure needs to assess the knowledge, skills, abilities required for job performance, not the exact task behaviors the job may demand.

Can you explain why not?

Mr. SCHNEIDER. Yes, sir; frequently jobs require certain kinds of skills and abilities and we can assess those without having the physical representation of the job. We make a distinction between something we call psychological fidelity and physical fidelity. And the current emphasis in content validation and the development of selection procedures by professionals is to focus on the psychological rather than the physical fidelity.

There, in that case, we no longer need to actually develop physical representations of jobs.

Mr. MARTINEZ. Well, thank you very much, both of you for coming and giving us the advantage of your expertise. We are going to make a couple of announcements, then we will adjourn.

I would like to insert into the record two letters: the letter of our response to Clarence Thomas upon his response to our invitation letter. We will insert the invitation letter and our response to his response to clarify the record as to what transpired between the chairman and this subcommittee.

[The letters follows:]

COMMITTEE ON EDUCATION AND LABOR,
HOUSE OF REPRESENTATIVES,
Washington, DC, July 9, 1985.

Hon. CLARENCE THOMAS,
Chairman, Equal Employment Opportunity Commission,
Washington, DC.

DEAR CHAIRMAN THOMAS: We are in receipt of your letter of July 8, 1985, expressing concerns regarding the Committee on Education and Labor's staff's attempts to secure an EEOC Commissioner's presence at the oversight hearings on July 11, 18, 23 and 31. As you know from the letters of invitation, these hearings will address issues of critical importance to the Commission, the Committee, and the public. You further know that it is the responsibility of the Committee to thoroughly examine these issues.

Your letter states that the Commission's Office of Congressional Affairs received no notice in advance of the June 17, 1985 letter of invitation requesting that you testify at the July 11 hearing. This information is incorrect. Members of your staff were verbally apprised of the July 11 hearing approximately two to three weeks in advance of this date. If your staff did not inform you of the verbal communication on this matter, that is an issue you must raise with them.

Secondly, you are undoubtedly aware that July is one of the busiest months for the Congress, as it precedes the August recess. Knowing that, it is curious that neither you nor your fellow Commissioners, nor your Acting General Counsel, was available to testify at our hearings scheduled for July 11 or July 23. While we welcome the testimony of the Director of Public Programs for the July 23 hearing, we are dismayed that not one of the Commissioners, who alone may speak for the Commission, was available to be heard.

Please understand that the Committee staff was in no way attempting to impugn the Commission's motives when they found that none of the Commissioners would attend these critically important hearings. The Committee and its staff values the expertise and historical cooperation extended by the Commission. Please also understand, however, that just as the Commissioners must honor their commitments to those with whom they arranged to meet in the month of July, the Committee on Education and Labor must honor its commitment to the public by holding these important hearings.

In the interest of promoting cooperation between the Commission and the Committee, we would like your assurance that the Commission will not vote on the revisions to the Uniform Guidelines on Employee Selection Procedures until the Committee has had an adequate time to review the proposed revisions and to conduct an oversight hearing. With this assurance, we will postpone the hearing on the Guidelines which is currently scheduled for July 31.

As you know, the Commission is the lead agency responsible for enforcing federal equal employment opportunity programs which is the focus of the July 23 hearing. It is imperative that a Commissioner be made available to testify on that date. We strongly urge that you and your fellow Commissioners review your schedules and select one among you to be present at that hearing.

We greatly appreciate Commissioner Alvarez's agreeing to testify at the July 18 hearing on the Commission's new remedial enforcement policies. His testimony will be very useful to the Committee's deliberation on this issue.

Please let us know at your earliest convenience whether you or the other Commissioners can accommodate the Committee during the July 23 hearing and whether the Commission will agree to delay action on the Uniform Guidelines until the Committee has had a chance to examine the proposed modifications.

Sincerely,

AUGUSTUS F. HAWKINS,
Chairman, Committee on Education and Labor.
MATTHEW G. MARTINEZ,
Chairman, Subcommittee on Employment Opportunities.

Mr. MARTINEZ. We still would like it to be known that in his letter he referred to Commissioners not being available for a certain hearing, which is on a regular Commission day, on the 23d. And apparently they were not going to be available here other than Mr. Alvarez, and then magically three of them appeared.

We will allow the record to be open for 2 weeks for additional testimony. With that the meeting is adjourned. Thank you again.

Mr. CASCIO. Thank you, sir.

Mr. SCHNEIDER. Thank you.

[Whereupon, at 12:06 p.m., the hearing was adjourned, subject to the call of the Chair.]